

Florida State University Law Review

Volume 40 | Issue 4

Article 7

2013

Graham's Applicability to Term-of-Years Sentences and Mandate to Provide a "Meaningful Opportunity" for Release

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FLORIDA STATE UNIVERSITY LAW REVIEW



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VOLUME 40

SUMMER 2013

NUMBER 4

Recommended citation: Krisztina Schlessel, *Graham's Applicability to Term-of-Years Sentences and Mandate to Provide a "Meaningful Opportunity" for Release*, 40 FLA. ST. U. L. REV. 1027 (2013).

GRAHAM'S APPLICABILITY TO TERM-OF-YEARS SENTENCES AND MANDATE TO PROVIDE A “MEANINGFUL OPPORTUNITY” FOR RELEASE

KRISZTINA SCHLESSEL*

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* J.D. 2013, Florida State University College of Law. I would like to thank Professor Wayne A. Logan for his guidance with this Note. I am also eternally grateful to my family and fiancé for their unwavering love and support.

I. INTRODUCTION

As a female college student is exiting her car, a masked adult male runs toward her, points a gun, and instructs her to hand over her money and property.¹ He then orders her to get into the passenger seat of her own car, which he drives off in pursuit of another vehicle.² After the two cars come to a stop, an armed sixteen-year-old male enters the victim's vehicle; both males are pointing their guns at the female victim.³ The sixteen-year-old orders the victim out of the car and continues to hold her at gunpoint while he and his accomplice take turns raping her.⁴ They then force her to the trunk and rape her again.⁵ The brutality continues as the sixteen-year-old throws the victim onto the ground and, while still holding her at gunpoint, the two males take turns repeatedly raping her.⁶ The sixteen-year-old is convicted as an adult of numerous offenses and is sentenced to consecutive terms of imprisonment totaling eighty-nine years.⁷ He challenges the constitutionality of his sentence pursuant to *Graham v. Florida*.⁸

In *Graham v. Florida*, the Supreme Court held that the imposition of a life without parole sentence on a juvenile nonhomicide offender constitutes cruel and unusual punishment, in violation of the Eighth Amendment.⁹ The holding was motivated by the Court's recognition that juveniles are constitutionally different from adults because the characteristics of youth render them less morally culpable.¹⁰ Thus, juveniles are less deserving of the second-harshes punishment of life without parole, which impermissibly leaves them without hope of release upon demonstrated reform.¹¹ Accordingly, states are required to provide juvenile nonhomicide offenders with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."¹² While states must provide juveniles with "some realistic opportunity to obtain release," they "need not guarantee [juvenile] offender[s'] eventual release" from prison.¹³

The *Graham* opinion has led to an abundance of uncertainty and litigation; indeed, courts and legislatures are struggling to resolve several significant issues. This Note examines whether it is unconsti-

1. Bunch v. Smith, 685 F.3d 546, 547-48 (6th Cir. 2012).

2. *Id.* at 548.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 547.

8. *Id.*

9. *Graham v. Florida*, 130 S. Ct. 2011, 2017-18, 2034 (2010).

10. *See id.* at 2026-27.

11. *See id.*

12. *Id.* at 2030.

13. *Id.* at 2034.

tutional pursuant to *Graham* to impose a lengthy term-of-years-without-parole sentence on a juvenile nonhomicide offender, such as the eighty-nine-year sentence on the juvenile rapist described above. To properly resolve *Graham*’s applicability to term-of-years sentences and the attendant line-drawing problems, it is necessary to address what constitutes the requisite “meaningful opportunity” to obtain release.

Accordingly, Part II provides a general overview of the Eighth Amendment, a thorough review of the Supreme Court’s precedent establishing that juveniles are constitutionally different from adults, and an introduction to the issues discussed in this Note. Part III provides a comprehensive description of how courts across the nation have resolved *Graham*’s applicability to term-of-years sentences and offers a critique of the present approaches. Part IV examines what the Court’s mandate to provide “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation”¹⁴ entails and presents the proper approach to *Graham*’s applicability to term-of-years sentences. Part IV also describes Florida’s unsuccessful legislative efforts to comply with *Graham*’s mandate and provides guidance for future efforts. Part V offers concluding remarks.

II. THE EIGHTH AMENDMENT ESPECIALLY PROTECTS JUVENILES

Section A provides a general overview of the punishments the Eighth Amendment prohibits, the purposes of the Amendment, and the Supreme Court’s approaches to Eighth Amendment challenges. Section B provides a thorough analysis of *Roper v. Simmons* and *Graham v. Florida*—the Court’s cases establishing that juvenile offenders are constitutionally different from adults and must receive special Eighth Amendment protection. Lastly, Section C introduces the significant issues that arise from *Graham* and lie at the heart of this Note.

A. *The Eighth Amendment: Prohibitions, Purposes, and Analyses*

The Eighth Amendment of the United States Constitution pronounces that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁵ The Eighth Amendment is applicable to the states through the Fourteenth Amendment¹⁶ and prohibits “all excessive punishments, as

14. *Id.* at 2030.

15. U.S. CONST. amend. VIII.

16. *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). *Kennedy* held that the Eighth and Fourteenth Amendments proscribe the imposition of the death penalty for child rape. *Id.* at 421. The Court concluded that “there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other” because nonhomicide crimes “cannot be compared to

well as cruel and unusual punishments that may or may not be excessive.’ ”¹⁷

The Eighth Amendment proscriptions are premised on the “basic ‘precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.’ ”¹⁸ While this proportionality principle “is central to the Eighth Amendment,”¹⁹ it is “a ‘narrow proportionality principle,’ that ‘does not require strict proportionality between crime and sentence’ but rather ‘forbids only extreme sentences that are grossly disproportionate to the crime.’ ”²⁰ Moreover, the Amendment encompasses “the essential principle that . . . the State must respect the human attributes even of those who have committed serious crimes.”²¹ Accordingly, the prohibitions serve to protect “the dignity of man” and ensure that the government exercises its power to punish “within the limits of civilized standards.”²²

To determine what sentences comply with the civilized standards and are thus not excessive or cruel and unusual, “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”²³ Consequently, whether the Eighth Amendment prohibits a punishment depends not on the standards that prevailed when the Bill of Rights was adopted, but on the standards that “currently prevail.”²⁴ The Court’s precedent concerning sentence proportionality “fall[s] within two general classifications”: “challenges to the length of term-of-years sentences” and “categorical restrictions on the death penalty.”²⁵ In a case involving a

murder in their ‘severity and irrevocability.’ ” *Id.* at 438 (quoting *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion)). *See also* *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (per curiam); *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

17. *Kennedy*, 554 U.S. at 419 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002)).

18. *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

19. *Graham*, 130 S. Ct. at 2021.

20. *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000-01 (1991) (Kennedy, J., concurring in part and concurring in the judgment)); *see also* *Ewing v. California*, 538 U.S. 11, 30-31 (2003) (upholding a prison sentence of twenty-five years to life for felony grand theft pursuant to a three-strikes law because the Eighth Amendment’s narrow proportionality principle prohibits only “grossly disproportionate” sentences). The Court in *Ewing* also noted that the proportionality principle applies in the noncapital context. *Id.* at 23 (citing *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in the judgment)).

21. *Graham*, 130 S. Ct. at 2021.

22. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

23. *Id.* at 101; *id.* at 100-01 (noting “that the words of the Amendment are not precise, and that their scope is not static”); *see also* *Graham*, 130 S. Ct. at 2021 (noting the standard for determining what constitutes cruel and unusual punishment remains the same, but its applicability changes with society’s morals (quoting *Kennedy*, 554 U.S. at 419)).

24. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

25. *Graham*, 130 S. Ct. at 2021.

challenge to a term-of-years sentence, “the Court considers all the circumstances” of the particular case.²⁶ Specifically,

[a] court must begin by comparing the gravity of the offense and the severity of the sentence. “[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality” the court should then compare the defendant’s sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis “validate[s] an initial judgment that [the] sentence is grossly disproportionate,” the sentence is cruel and unusual.²⁷

On the other hand, a categorical challenge has historically involved the death penalty (at least before *Graham v. Florida*) and turns on either the nature of the offense or the characteristics of the offender.²⁸ In such a case,

[t]he Court first considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,” the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.²⁹

In *Graham v. Florida*, for the first time the Court faced “a categorical challenge to a term-of-years sentence”; because the case “implicate[d] a particular type of sentence as it applie[d] to an entire class of of-

26. *Id.*

27. *Id.* at 2022 (citations omitted) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). As the *Graham* Court noted, cases in the terms-of-years category include *Ewing v. California*, 538 U.S. 11 (2003) (upholding a prison sentence of twenty-five years to life for the grand theft of golf clubs pursuant to a three-strikes law); *Harmelin*, 501 U.S. 957 (upholding a life without parole sentence for possession of a large quantity of cocaine); *Solem v. Helm*, 463 U.S. 277 (1983) (holding unconstitutional a life without parole sentence for a seventh nonviolent felony, passing a worthless check); *Hutto v. Davis*, 454 U.S. 370, 371 (1982) (per curiam) (upholding a forty-year prison sentence for “possession [of marijuana] with intent to distribute and distribution of mari[j]uana”); and *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding a sentence of life with the possibility of parole for a third nonviolent felony offense, obtaining money by false pretenses). *Graham*, 130 S. Ct. at 2021-22.

28. *Graham*, 130 S. Ct. at 2022.

29. *Id.* (citations omitted) (quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005); *Kennedy v. Louisiana*, 554 U.S. 407, 408 (2008)). As the *Graham* Court noted, cases involving a categorical challenge include *Kennedy*, 554 U.S. 407 (holding unconstitutional the death penalty for nonhomicide crimes); *Roper*, 543 U.S. 551 (holding unconstitutional the death penalty for offenders who are under the age of eighteen at the time of the crime); *Atkins*, 536 U.S. 304 (holding unconstitutional the death penalty for mentally retarded offenders); *Enmund v. Florida*, 458 U.S. 782 (1982) (same); and *Coker v. Georgia*, 433 U.S. 584 (1977) (same). *Graham*, 130 S. Ct. at 2022.

fenders who [had] committed a range of crimes,” the Court applied the categorical analysis.³⁰

B. Juveniles Are Constitutionally Different From Adults

1. Roper v. Simmons

In *Roper v. Simmons*, the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the “imposition of the death penalty on offenders who were under the age of [eighteen]” at the time of their crime.³¹ Applying the categorical approach, the Court first concluded that the objective indicia of society’s standards demonstrate a consensus against the death penalty for juveniles.³² Specifically, the Court observed that the majority of states do not allow the imposition of the death penalty on juveniles, states that do allow it rarely impose it, and there has been a trend toward abolishing the practice.³³

Next, the Court exercised its independent judgment and determined that the death penalty is a disproportionate punishment for juveniles in light of relevant precedent and the special characteristics of youth.³⁴ Precedent has established that because “the death penalty is the most severe punishment,”³⁵ it “must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”³⁶ Juveniles are not “among the worst offenders,” as illustrated by three chief differences between juveniles and adults.³⁷ The first difference, demonstrated by experience and scientific and sociological studies, is that “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”³⁸ Second, “juveniles are more vulnerable or susceptible to negative influences

30. *Graham*, 130 S. Ct. at 2022-23 (reasoning that comparison of the punishment’s severity with the crime’s gravity would be fruitless because the challenge does not involve a particular defendant’s sentence, but a whole sentencing practice).

31. *Roper*, 543 U.S. at 578.

32. *See id.* at 564, 567.

33. *Id.* at 567. The Court noted that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.” *Id.* at 566 (quoting *Atkins*, 536 U.S. at 315).

34. *Id.* at 564, 568-70, 575.

35. *Id.* at 568 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O’Connor, J., concurring in the judgment)).

36. *Id.* (quoting *Atkins*, 536 U.S. at 319).

37. *Id.* at 569.

38. *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

and outside pressures, including peer pressure.”³⁹ Third, “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”⁴⁰ As such, “it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character . . . , for a greater possibility exists that a minor’s character deficiencies will be reformed.”⁴¹ These manifest differences reveal that juveniles possess diminished culpability for their crimes.⁴²

Consequently, juvenile death sentences do not fully serve retributive and deterrence purposes, which are the two penological justifications for the penalty.⁴³ “Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”⁴⁴ Moreover, “the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”⁴⁵

The Court recognized that drawing the line at the age of eighteen is both under- and over-inclusive, but reasoned that “a line must be drawn,” and “[t]he age of [eighteen] is the point where society draws the line for many purposes between childhood and adulthood.”⁴⁶ Lastly, the Court consulted foreign and international law to instruct and support, but not control, its interpretation of the Eighth Amendment.⁴⁷ In doing so, the Court concluded that “the United States now [stood] alone in a world that ha[d] turned its face against the juvenile death penalty.”⁴⁸

39. *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)); *see also Eddings*, 455 U.S. at 115 (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”).

40. *Roper*, 543 U.S. at 570.

41. *Id.* at 570; *see also id.* at 573 (noting even psychologists have difficulty differentiating between “transient immaturity” and “irreparable corruption”).

42. *Id.* at 561 (noting that “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult” (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988))).

43. *Id.* at 571-72 (citing *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

44. *Id.* at 571.

45. *Id.*

46. *Id.* at 574 (concluding that the Court’s logic behind prohibiting the death penalty for juveniles under the age of sixteen in *Thompson*, 487 U.S. 815, extends to juveniles under eighteen).

47. *Id.* at 575-78; *id.* at 578 (“It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”).

48. *Id.* at 577.

2. Graham v. Florida

Terrance Graham was sentenced to life imprisonment for armed burglary and fifteen years imprisonment for attempted armed robbery following a conviction for violation of probation.⁴⁹ Because Florida had abolished its parole system, Graham had no possibility of release, save for executive clemency.⁵⁰ Graham was under the age of eighteen at the time of his offenses.⁵¹ The issue before the Supreme Court was “whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime.”⁵² The Court analyzed the Eighth Amendment issue pursuant to the categorical approach⁵³ and answered it in the negative.⁵⁴

The Court first examined the objective indicia of national consensus and found that thirty-seven states, the District of Columbia, and the federal government permit life-without-parole sentences for juvenile nonhomicide offenders; however, the actual imposition of the sentence is so infrequent that it demonstrates “a consensus against its use.”⁵⁵ Next, the Court scrutinized the constitutionality of the sen-

49. *Graham v. Florida*, 130 S. Ct. 2011, 2020 (2010).

50. *Id.*

51. *Id.* at 2018. Graham was sixteen years old when he committed the armed burglary with assault or battery and attempted armed robbery. *Id.* He pled guilty and begged the court for a second chance, promising to turn his life around. *Id.* The court withheld adjudication and sentenced him to three years of probation on each count, to run concurrently, with the first twelve months to be served in jail. *Id.* Less than six months after his release from jail, and about a month shy of his eighteenth birthday, Graham was arrested for home invasion robbery and attempted robbery following a high-speed chase. *Id.* at 2018-19. The police also found three handguns in his vehicle. *Id.* at 2019. Graham admitted to police that he had been involved in two or three robberies aside from the two robberies on the night in question. *Id.* In court, Graham denied his involvement in the home invasion robbery but admitted violating his probation by fleeing from police. *Id.* The court found that Graham violated his probation by attempting to avoid arrest, committing home invasion robbery, possessing a firearm, and “associating with persons engaged in criminal activity.” *Id.* Under Florida law, Graham faced a minimum of five years imprisonment without a downward departure, and a maximum of life imprisonment. *Id.* The defense attorney requested five years; the Florida Department of Corrections recommended at most four years; and the State recommended thirty years for the armed burglary and fifteen years for the attempted armed robbery. *Id.* The trial court judge explained that he did not understand how Graham “would be given such a great opportunity to do something with [his] life” but would rather “throw it away.” *Id.* His criminal behavior was escalating; because he could not be helped onto the right path, the court had to focus on the community’s safety. *Id.* at 2019-20.

52. *Id.* at 2017-18.

53. *Id.* at 2022-23. The Court was faced with “a categorical challenge to a term-of-years sentence” for the first time and concluded that only the categorical approach was appropriate because “a sentencing practice itself is in question.” *Id.* at 2022. The challenge “implicate[d] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes”; thus, comparing the gravity of the crime to the severity of the sentence was unhelpful. *Id.* at 2022-23.

54. *See id.* at 2034.

55. *Id.* at 2023. Six jurisdictions prohibit life-without-parole sentences for all juvenile offenders, and an additional seven jurisdictions prohibit the sentence for juvenile

tence pursuant to its own independent judgment.⁵⁶ The Court began by examining the culpability of juvenile nonhomicide offenders and concluded that "compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis."⁵⁷

As to age, the Court reaffirmed *Roper*'s premise that "juveniles have lessened culpability" than adults because they "have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'"⁵⁸ Indeed, psychology and brain science demonstrate that the parts of the brain that control behavior continue to develop through late adolescence.⁵⁹ Because juveniles are less morally culpable and more amenable to change, "they are less deserving of the most severe punishments."⁶⁰

As for the nature of the offense, the Court had "recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."⁶¹ "[L]ife without parole is 'the second most severe' "⁶² sentence and, unlike any other, it has the following characteristics in common with the death penalty:

[T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. . . . [T]his sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."⁶³

Therefore,

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve

nonhomicide offenders. *Id.* However, only 123 juvenile nonhomicide offenders are serving life-without-parole sentences—77 in Florida and 46 across ten states. *Id.* at 2024.

56. *Id.* at 2026.

57. *Id.* at 2027.

58. *Id.* at 2026 (quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)) (internal quotation marks omitted).

59. *Id.*

60. *Id.* (citing *Roper*, 543 U.S. at 569).

61. *Id.* at 2027 (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977)).

62. *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)).

63. *Id.* (citation omitted) (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)).

more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. . . . This reality cannot be ignored.⁶⁴

The Court next considered legitimate penological goals and concluded that none justify a sentence of life without parole for juvenile nonhomicide offenders, thereby rendering the sentence disproportionate to the offense.⁶⁵ Retribution does not justify the second-most-severe sentence for an offender whose moral culpability is twice diminished for at “ ‘[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.’ ”⁶⁶ Moreover, “ ‘the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.’ ”⁶⁷ Regardless, “any limited deterrent effect” would not justify the sentence for it is grossly disproportionate “in light of juvenile nonhomicide offenders’ diminished moral responsibility.”⁶⁸ Incapacitation is likewise an insufficient justification because courts cannot reliably determine at the outset that a juvenile is incapable of rehabilitation.⁶⁹ “A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.”⁷⁰ Lastly,

[t]he penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. A State's rejection of rehabilitation, moreover, goes beyond a mere expressive judgment. . . . [D]efendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.⁷¹

Therefore, the Court held, the Eighth Amendment bars life-without-parole sentences for juvenile nonhomicide offenders.⁷² The Court clarified the scope of this prohibition:

64. *Id.* at 2028 (citing *Roper v. Simmons*, 543 U.S. 551, 572 (2005)).

65. *Id.* at 2028-30.

66. *Id.* at 2028 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

67. *Id.* (quoting *Roper*, 543 U.S. at 571).

68. *Id.* at 2029.

69. *Id.*

70. *Id.*

71. *Id.* at 2030 (citations omitted).

72. *Id.*

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. . . . The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.⁷³

Thus, if the State imposes a life sentence on a juvenile nonhomicide offender, it must provide the juvenile “with some realistic opportunity to obtain release before the end of that term.”⁷⁴ Lastly, the Court’s holding was supported, although not controlled, by the global consensus that exists against the imposition of life without parole sentences on juvenile nonhomicide offenders; indeed, the United States was the only nation that actually imposed the sentence.⁷⁵

C. *Complying With Graham v. Florida: Unresolved Issues*

The *Graham* opinion raises a multitude of issues, including the following two interrelated matters that remain unresolved.⁷⁶ The first

73. *Id.*

74. *Id.* at 2034.

75. *Id.* at 2033-34 (noting that eleven nations authorize life-without-parole sentences for juvenile nonhomicide offenders, but only the United States imposes it).

76. Additionally, the *Graham* holding was limited to juvenile nonhomicide offenders, leaving open the question of whether the Eighth Amendment bars life-without-parole sentences for juvenile homicide offenders. In *Miller v. Alabama*, the Court avoided this issue by concluding that it was the sentencing schemes mandating life without parole that made the juvenile homicide offenders’ life without parole sentences unconstitutional. 132 S. Ct. 2455, 2469 (2012). Indeed, the Court expressly retained the possibility of life-without-parole sentences for juvenile homicide offenders. *Id.* Notably though, the Court opined that the sentence would rarely be appropriate. *Id.* This comment, coupled with the *Roper*, *Graham*, and *Miller* holdings, may very well signal the Court’s willingness to extend *Graham* to juvenile homicide offenders—a conclusion that did not go undrawn by the *Miller* dissenters. See *id.* at 2489-90 (Alito, J., dissenting). Moreover, even though *Graham* emphasized the twice-diminished culpability of juvenile nonhomicide offenders, the Court must deem unconstitutional life without parole sentences for juvenile homicide offenders in order to remain true to the principle that juveniles are constitutionally different from adults. See *Graham*, 130 S. Ct. at 2026-27. This point is illustrated by the *Graham* dissenters:

[I]n the end, the Court does not even believe its pronouncements about the juvenile mind. If it did, the categorical rule it announces today would be most peculiar because it leaves intact state and federal laws that permit life-without-parole sentences for juveniles who commit homicides. The Court thus acknowledges that there is nothing inherent in the psyche of a person less than [eighteen] that prevents him from acquiring the moral agency necessary to warrant a life-without-parole sentence. . . . The Court is quite willing to accept that a [seventeen]-year-old who pulls the trigger on a firearm can demonstrate sufficient depravity and irredeemability to be denied reentry into society, but

issue is whether *Graham* applies to a lengthy term-of-years-without-parole sentence that is imposed on a juvenile nonhomicide offender. In his *Graham* dissent, Justice Alito emphasized that the majority's holding was limited to " 'the sentence of *life without parole*' " and in no way affected term-of-years sentences.⁷⁷ While several courts have followed this reasoning, Part III, Section B demonstrates why the reasoning is flawed and leads to an unconstitutional result. The second issue *Graham* leaves unresolved concerns the manner in which states can achieve compliance with its holding. As the dissent correctly noted, the Court's holding "invite[s] a host of line-drawing problems But what, exactly, does such a 'meaningful' opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by parole boards the Court now demands that States empanel?"⁷⁸ This matter is addressed and expanded upon in Parts III and IV.

III. GRAHAM'S APPLICABILITY TO TERM-OF-YEARS-WITHOUT-PAROLE JUVENILE SENTENCES

Courts across the nation are at a loss regarding *Graham*'s applicability to lengthy term-of-years-without-parole sentences for juvenile nonhomicide offenders. Section A provides an exhaustive review of the case law and the two approaches courts have taken. Section B offers a critical analysis of each approach and ultimately rejects both.

A. Current Approaches to *Graham*'s Applicability to Term-of-Years Sentences

1. *Graham Does Not Apply to Term-of-Years Sentences*

(a) *Arizona Court of Appeals*

The Court of Appeals of Arizona rejects *Graham*'s applicability to a term-of-years sentence.⁷⁹ In *State v. Kasic*, the court considered an aggregate juvenile sentence of 139.75 years, imposed for thirty-two felony convictions that stemmed from six arsons and one attempted

insists that a [seventeen]-year-old who rapes an [eight]-year-old and leaves her for dead does not.

Id. at 2055 (Thomas, J., dissenting) (citations omitted). In the meantime, courts continue to uphold life without parole sentences for juvenile homicide offenders. *See, e.g.*, *Gonzalez v. State*, 50 So. 3d 633, 635-36 (Fla. 1st DCA 2010); *Conley v. State*, 972 N.E.2d 864, 869 (Ind. 2012); *State v. Ninham*, 2011 WI 33, ¶¶ 97-98, 333 Wis. 2d 335, 797 N.W.2d 451, 478. Further discussion of this issue is beyond the scope of this Note.

77. *Graham*, 130 S. Ct. at 2058 (Alito, J., dissenting) (quoting *id.* at 2030 (majority opinion)).

78. *Id.* at 2057 (Thomas, J., dissenting).

79. *State v. Kasic*, 265 P.3d 410, 414-15 (Ariz. Ct. App. 2011).

arson Kasic committed during a one-year period beginning at the age of seventeen.⁸⁰ The court affirmed Kasic’s sentence and held *Graham* inapplicable on the ground that the *Graham* holding was expressly limited to sentences of “life without parole solely for a nonhomicide offense”⁸¹ and did not require a juvenile nonhomicide offender’s eventual release from prison.⁸²

(b) *Florida Fourth District Court of Appeal*

The Fourth District Court of Appeal of Florida has also pronounced that *Graham* does not apply to lengthy term-of-years sentences.⁸³ In *Guzman v. State*, the defendant was sentenced to sixty years of imprisonment for violating his probation, which had been imposed for offenses he committed as a juvenile.⁸⁴ Guzman argued on appeal that his sixty-year sentence constituted a de facto life sentence in violation of *Graham*.⁸⁵ The court rejected this argument because it “believe[d] that the express holding of *Graham* established a bright-line and all-encompassing prohibition on actual life sentences without the possibility of parole” and “did not address the concept of a de facto life sentence.”⁸⁶ The court further stated:

[I]t is logistically impossible to determine what might or might not constitute a de facto life sentence—assuming such a concept is to be considered in the first instance. We should not burden our trial courts by directing them to function as actuaries in determining each individual defendant’s particularized life expectancy.⁸⁷

Accordingly, the court affirmed Guzman’s sixty-year sentence.⁸⁸ It also certified conflict with the decisions of the First District Court of Appeal of Florida, and it certified the following questions to the Florida Supreme Court as being of great public importance: “1. Does *Graham v. Florida* . . . apply to lengthy term-of-years sentences that

80. *Id.* at 411.

81. *Id.* at 414 (quoting *Graham*, 130 S. Ct. at 2023).

82. *Id.* at 415 (citing *Graham*, 130 S. Ct. at 2030). Upon concluding that “*Graham* does not categorically bar” lengthy term-of-years sentences, *id.*, the court applied the proportionality approach and upheld Kasic’s sentence, *id.* at 415-16.

83. *Guzman v. State*, No. 4D12-1354, 2013 WL 949889, at *1, *3 (Fla. 4th DCA Mar. 13, 2013).

84. *Id.* at *1. At the age of fourteen, Guzman committed several violent offenses to which he pleaded guilty; his sentence included “juvenile probation to be followed by adult probation.” *Id.* After reaching the age of majority, Guzman was convicted of kidnapping and was sentenced to life imprisonment. *Id.* The court also imposed a concurrent life sentence for violation of probation, which was subsequently reversed and replaced by a sixty-year prison term. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at *3.

88. *Id.*

amount to de facto life sentences?” and “2. If so, at what point does a term-of-years sentence become a de facto life sentence?”⁸⁹

(c) *Florida Fifth District Court of Appeal*

The Fifth District Court of Appeal of Florida likewise rejects *Graham*’s applicability to a lengthy term-of-years sentence.⁹⁰ In *Henry v. State*, seventeen-year-old Henry broke into a stranger’s apartment, battered the victim, threatened her with a gun, and sexually assaulted her repeatedly.⁹¹ He then made her take a shower and forced her to drive him to an ATM and withdraw money.⁹² Henry was sentenced to concurrent and consecutive sentences totaling ninety years imprisonment.⁹³ On appeal, Henry argued that because his life expectancy was 64.3 years,⁹⁴ the ninety-year sentence constituted a de facto life without parole sentence, in violation of *Graham*.⁹⁵ The court rejected Henry’s argument and quoted Justice Alito’s dissenting opinion that the *Graham* holding does not affect a lengthy term-of-years sentence.⁹⁶ The court also distinguished the “lengthy aggregate term-of-years sentence without the possibility of parole” from a “life sentence without parole.”⁹⁷ Moreover, it noted that not a single Florida court had invalidated a lengthy term-of-years sentence pursuant to *Graham*, and other jurisdictions were split on the issue.⁹⁸ Lastly, the court reasoned that a holding that refuses to extend *Graham* to a

89. *Id.*

90. *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. 5th DCA 2012). The Florida Supreme Court has accepted jurisdiction of the case. *Henry v. State*, 107 So. 3d 405 (Fla. 2012). See also *Johnson v. State*, 108 So. 3d 1153, 1154 (Fla. 5th DCA 2013) (mem.) (per curiam) (affirming the juvenile offender’s 100-year sentence for armed burglary of a dwelling, and certifying conflict with *Floyd v. State*, 87 So. 3d 45 (Fla. 1st DCA 2012), and *Adams v. State*, No. 1D11-3225, 2012 WL 3193932, at *1 (Fla. 1st DCA Aug. 8, 2012)); *Mediate v. State*, 108 So. 3d 703, 704, 706 (Fla. 5th DCA 2013) (“reject[ing] the defendant’s invitation to revisit *Henry*,” and affirming his 130-year sentence for kidnapping and four counts of sexual battery).

91. *Henry*, 82 So. 3d at 1085.

92. *Id.*

93. *Id.* at 1086. Henry was convicted of “three counts of sexual battery with a deadly weapon or physical force, one count of kidnapping with intent to commit a felony (with a firearm), two counts of robbery, one count of carjacking, one count of burglary of a dwelling, and one count of possession of twenty grams or less of cannabis.” *Id.* at 1085. His original sentence included several life sentences, which was modified pursuant to *Graham*. *Id.* at 1085-86.

94. *Id.* at 1086. Henry filed a National Vital Statistics Report that demonstrated his life expectancy at birth was 64.3 years based on his sex and race. *Id.*

95. *Id.* Under Florida law, an inmate must serve eighty-five percent of his sentence before becoming eligible for release pursuant to gaintime; thus, Henry had to serve at least 76.5 years in prison. *Id.*

96. See *id.* at 1087.

97. *Id.*

98. *Id.* at 1087-89. The court explained that intermediate appellate courts in California were split on the issue, whereas courts in Georgia and Arizona had consistently rejected *Graham*’s applicability to term-of-years sentences. *Id.* at 1088-89.

term-of-years sentence will be easy to follow.⁹⁹ On the other hand, *Graham* provides no direction for a holding to the contrary:

At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? There is language in the *Graham* majority opinion that suggests that no matter the number of offenses or victims or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is “life” or 107 years. Without any tools to work with, however, we can only apply *Graham* as it is written. If the Supreme Court has more in mind, it will have to say what that is.¹⁰⁰

(d) *Florida Second District Court of Appeal*

Similarly, the Second District Court of Appeal of Florida held *Graham* inapplicable to a term-of-years sentence in *Walle v. State*.¹⁰¹ In Pinellas County, Walle was sentenced to a total of twenty-seven years imprisonment for armed sexual battery, two counts of kidnapping, and three counts of armed robbery.¹⁰² Subsequently, in Hillsborough County he was sentenced to a total of sixty-five years imprisonment upon convictions on eighteen counts, including armed kidnappings and armed sexual batteries.¹⁰³ The sixty-five-year sentence was ordered to run consecutively with the twenty-seven-year sentence.¹⁰⁴ Walle committed the offenses underlying the sentences two weeks apart; he was thirteen years old at the time.¹⁰⁵ On appeal, Walle argued that his aggregate sentence of ninety-two years was the functional equivalent of life without parole, in violation of *Graham*.¹⁰⁶

The court interpreted *Graham* as requiring the presence of the following factors in order for *Graham*’s categorical ban to apply: “(1) the offender was a juvenile when he committed his offense, (2) the sentence imposed applied to a singular nonhomicide offense, (3) the

99. *Id.* at 1089.

100. *Id.* (footnote omitted).

101. *Walle v. State*, 99 So. 3d 967, 971, 973 (Fla. 2d DCA 2012) (certifying conflict with *Adams v. State*, No. 1D11-3225, 2012 WL 3193932, at *2 (Fla. 1st DCA Aug. 8, 2012)).

102. *Id.* at 968.

103. *Id.* In Hillsborough County, Walle pleaded guilty to “two counts of armed kidnapping, eleven counts of armed sexual battery with a deadly weapon, one count of armed burglary of a structure, one count of grand theft motor vehicle, one count of attempted armed robbery with a firearm, one count of grand theft in the third degree, and one count of carjacking with a deadly weapon.” *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

offender was 'sentenced to life,' and (4) the sentence does not provide the offender with any possibility of release during his lifetime."¹⁰⁷ The court found that only the first factor characterized Walle's sentences; thus, *Graham* was inapplicable.¹⁰⁸ The court acknowledged the Florida Fifth District Court of Appeal's concerns about extending *Graham* to term-of-years sentences¹⁰⁹ and added: "[T]he case before this court raises additional questions: What if the aggregate sentences are from different cases? From different circuits? From different jurisdictions? If from different jurisdictions, which jurisdiction must modify its sentence or sentences to avoid constitutional infirmity?"¹¹⁰ The court "cannot expand the Supreme Court's ruling beyond the limitations it set forth in its opinion, specifically its holding that *Graham* applies solely to a single sentence of life without parole."¹¹¹

(e) *Georgia Supreme Court*

Georgia state courts have held *Graham* inapplicable to a term-of-years sentence.¹¹² In *Adams v. State*, the Supreme Court of Georgia affirmed the following sentence of a fourteen- or fifteen-year-old juvenile offender: life for aggravated child molestation, with twenty-five years to be served in prison and the remainder on probation, plus twenty years for child molestation, with five years to be served in prison and the remainder on probation.¹¹³ The court reasoned that by its terms *Graham* forbids only a "life without parole" sentence for a juvenile nonhomicide offender and "does not foreclose the possibility" that a juvenile will spend the rest of his life in prison.¹¹⁴ "Clearly, '[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.'"¹¹⁵ Thus, no categorical ban applies to a term-of-years sentence.¹¹⁶

107. *Id.* at 970 (reasoning that the *Graham* holding "concern[ed] only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense" (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2023 (2010))).

108. *Id.* at 971.

109. *Id.* at 972 (citing *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. 5th DCA 2012)).

110. *Id.*

111. *Id.* at 971.

112. *See Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011); *Middleton v. State*, 721 S.E.2d 111, 113 (Ga. Ct. App. 2011).

113. *Adams*, 707 S.E.2d at 361-62. The indictment alleged the offenses occurred between May 1, 2007 and March 10, 2008; August 4, 2005 marked Adams' thirteenth birthday. *Id.* at 361-62.

114. *Id.* at 364-65 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010)).

115. *Id.* at 365 (quoting *Graham*, 130 S. Ct. at 2058 (Alito, J., dissenting)).

116. *Id.* Aside from a strictly literal reading of *Graham*'s holding and reference to Justice Alito's dissenting opinion, the Supreme Court of Georgia did not provide any analysis in support of its holding regarding the applicability of the categorical approach. *See id.* The court proceeded to apply the proportionality approach and held that Adams's sentence did "not raise a threshold inference of gross disproportionality." *Id.*

(f) *Louisiana Supreme Court*

The Supreme Court of Louisiana has held that *Graham* does not apply to a term-of-years sentence without parole.¹¹⁷ In *State v. Brown*, the defendant was convicted of aggravated kidnapping and four counts of armed robbery for offenses he committed at the age of sixteen.¹¹⁸ Brown was sentenced to imprisonment without parole for aggravated kidnapping and ten-year imprisonment without parole for each armed robbery; the five sentences were to run consecutively.¹¹⁹ Upon Brown’s post-*Graham* appeal, the district court amended each of his five sentences by removing parole ineligibility.¹²⁰ The court of appeals affirmed, and the State appealed the amendment of the ten-year sentences.¹²¹

The issue before the Louisiana Supreme Court was whether a seventy-year sentence, imposed on a juvenile nonhomicide offender, is constitutional pursuant to *Graham*.¹²² The court began by discussing *Graham* and the accompanying dissenting opinions.¹²³ It then drew a distinction between *Graham*’s life sentence for a single offense and Brown’s consecutive fixed-term sentences for multiple offenses.¹²⁴ The court also pointed out the “difficulty of applying *Graham* to non-life sentences.”¹²⁵ Moreover, recent state legislation achieved compliance with *Graham* by providing that a juvenile nonhomicide offender sentenced to life imprisonment may be eligible for parole after serving thirty years.¹²⁶ On the other hand, state laws explicitly prohibit parole for armed robbery, as well as for a person convicted of three or more felonies, and do not make an exception for juvenile offenders.¹²⁷ Lastly, the court concluded that “nothing in *Graham* addresses a

117. *State v. Brown*, 2012-0872 (La. 5/7/13); 2013 WL 1878911, at *1. The issue before the court was whether *Graham* “applies in a case in which the juvenile offender committed multiple offenses resulting in cumulative sentences matching or exceeding his life expectancy without the opportunity of securing early release from confinement.” *Id.*

118. *Id.* at *3.

119. *Id.*

120. *Id.* at *4

121. *Id.* at *4-5.

122. *Id.* at *5. The court explained that Brown “will be eligible for parole on the life sentence after serving [thirty] years . . . at approximately age [forty-six] . . .” *Id.* However, if his original four ten-year sentences without parole were reinstated, he could not become eligible for release until the age of eighty-six. *Id.*

123. *Id.* at *6-7.

124. *Id.* at *8-9 (quoting *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012)).

125. *Id.* at *10 (quoting *Henry v. State*, 82 So. 3d 1084, 1088-89 (Fla. 5th DCA 2012)).

126. *Id.* at *12-13. The court explained that in *State v. Shaffer* it held the then-applicable statutes unconstitutional as applied to juvenile nonhomicide offenders because they precluded parole eligibility. *Id.* at *11. However, the *Shaffer* “decision was only ‘an interim measure (based on the legislature’s own criteria) pending the legislature’s response to *Graham*.’” *Id.* at *12 (quoting *State v. Shaffer*, 11-1756 (La. 11/23/11), 77 So. 3d 939, 943 n.6).

127. *Id.* at *14.

defendant convicted of multiple offenses and given term of year sentences”¹²⁸

As our state legislature has provided for these sentences, as it has the constitutional authority to do, we have no authority, absent a disproportionality review not possible or requested here, to amend these sentences. In our view, *Graham* does not prohibit consecutive term of year sentences for multiple offenses committed while a defendant was under the age of [eighteen], even if they might exceed a defendant’s lifetime, and, absent any further guidance from the United States Supreme Court, we defer to the legislature¹²⁹

Accordingly, the court affirmed the district court’s amendment of Brown’s life sentence, but reversed the amendment of the four ten-year sentences for armed robberies upon holding that the court was not authorized to remove parole ineligibility.¹³⁰

(g) *Texas First District Court of Appeals*

In *Burnell v. State*, the First District Court of Appeals of Texas rejected the juvenile offender’s argument that his twenty-five-year sentence for aggravated robbery violated *Graham*’s categorical ban.¹³¹ The court explained that Burnell’s “reading of *Graham* is overbroad”¹³² for the *Graham* Court applied the categorical approach because the case involved “‘a particular type of sentence as it applie[d] to an entire class of offenders who [had] committed a range of crimes.’”¹³³ In contrast, Burnell contested not “a particular type of sentence” but long sentences in general.¹³⁴ Moreover, the *Graham* holding was limited to a life without parole sentence.¹³⁵ Thus, the court held *Graham*’s categorical ban inapplicable.¹³⁶

128. *Id.* at *15.

129. *Id.*

130. *Id.* at *15-16.

131. *Burnell v. State*, No. 01-10-00214-CR, 2012 WL 29200, at *1, *8-9 (Tex. App. Jan. 5, 2012).

132. *Id.* at *8.

133. *Id.* (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2022-23 (2010)).

134. *Id.* (internal quotations omitted).

135. *Id.*

136. *Id.* at *9. Accordingly, the court applied the proportionality approach outlined in *Harmelin v. Michigan* and held that Burnell’s sentence was not “grossly disproportionate to the violent nature of this crime.” *Id.* See also *Diamond v. State*, Nos. 09-11-00478-CR & 09-11-00479-CR, 2012 WL 1431232, at *1, *4, *5 (Tex. App. Apr. 25, 2012) (affirming, without any mention of *Graham*, a juvenile nonhomicide offender’s ninety-nine-year sentence on the ground that the defendant failed to prove that the sentence was grossly disproportionate to his offense).

(h) *United States Court of Appeals for the Sixth Circuit*

Lastly, according to the United States Court of Appeals for the Sixth Circuit, *Graham* only applies to technical “life” without parole sentences and does not apply to a lengthy term-of-years sentence even when it constitutes the functional equivalent of life without parole.¹³⁷ In *Bunch v. Smith*, sixteen-year-old Bunch and his accomplice robbed and kidnapped a college student and took turns repeatedly raping her orally, anally, and vaginally at gunpoint.¹³⁸ Bunch was sentenced to consecutive terms of imprisonment totaling eighty-nine years.¹³⁹ The Sixth Circuit Court of Appeals affirmed Bunch’s sentence and held *Graham* and *Miller* inapplicable to “consecutive, fixed-term sentences for committing multiple nonhomicide offenses.”¹⁴⁰ The court reasoned that *Graham*’s holding, by its plain language, is limited to “‘life without parole sentence[s],’”¹⁴¹ and if the Supreme Court wishes to expand that holding, it must do so explicitly.¹⁴² The *Graham* Court “did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders,” which “demonstrates that the Court did not even consider the constitutionality of such sentences, let alone clearly establish that they can violate the Eighth Amendment’s prohibition on cruel and unusual punishments.”¹⁴³ Moreover, not a single federal court has extended *Graham* to consecutive, fixed-term sentences, and state courts are split on the issue.¹⁴⁴ Lastly, the court noted that a contrary holding would leave many questions unanswered, such as the number of years that would implicate *Graham*’s holding, whether gaintime would be considered, and whether the number of crimes would be relevant.¹⁴⁵

137. *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012), *cert. denied*, *Bunch v. Bobby*, 133 S. Ct. 1996 (2013).

138. *Id.* at 547-48; *see also supra* notes 1-8 and accompanying text.

139. *Bunch*, 685 F.3d at 548.

140. *See id.* at 553.

141. *Id.* at 552 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010)).

142. *See id.* at 553 (quoting *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. 5th DCA 2012)).

143. *Id.* at 552.

144. *Id.* at 551-52.

145. *Id.* at 552 (citing *Henry*, 82 So. 3d at 1089). *See also* *Goins v. Smith*, No. 4:09-CV-1551, 2012 WL 3023306, at *6 (N.D. Ohio July 24, 2012) (upholding a juvenile nonhomicide offender’s aggregate sentence of eighty-four years imprisonment because, pursuant to *Bunch*, *Graham* applies only to sentences that are technically life without parole sentences, and not to sentences that are their functional equivalent); *Angel v. Commonwealth*, 704 S.E.2d 386, 401-02 (Va. 2011) (affirming a juvenile nonhomicide offender’s “three life sentences [without parole], plus sentences of twenty years and twelve months, all of which were to run consecutively” on the ground that the defendant might be eligible for conditional release at the age of sixty, and holding that the provision for conditional release complied with *Graham*’s “meaningful opportunity to obtain release” mandate).

2. *Graham Applies to Term-of-Years Sentences That Are the Functional Equivalent of Life Without Parole*

(a) *California Supreme Court*

Pursuant to *Graham*, the California Supreme Court held that a term-of-years sentence that does not allow for parole eligibility within a juvenile nonhomicide offender's natural life expectancy constitutes cruel and unusual punishment.¹⁴⁶ In *People v. Caballero*, the court held that a sixteen-year-old offender's aggregate sentence of 110 years to life, imposed pursuant to three attempted-murder convictions and three corresponding firearm enhancements, violated the Eighth Amendment.¹⁴⁷ According to the court, *Miller v. Alabama* "made it clear that *Graham*'s 'flat ban' on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including the term-of-years sentence that amounts to the functional equivalent of a life without parole sentence"¹⁴⁸ Moreover, *Graham* does not "focus on the precise sentence meted out";¹⁴⁹ instead, it requires states to "provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime."¹⁵⁰ Because Caballero was required to serve over a hundred years before becoming parole-eligible, the sentence unconstitutionally denied him the requisite opportunity to obtain release based on "'demonstrate[d] growth and maturity.'"¹⁵¹

(b) *Colorado Court of Appeals*

The Colorado Court of Appeals has held that a lengthy aggregate term-of-years sentence that is the functional equivalent of a life sentence without parole constitutes cruel and unusual punishment pursuant to *Graham*.¹⁵² In *People v. Rainer*, the court considered the 112-year sentence of a seventeen-year-old offender who was convicted of

146. *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012).

147. *Id.* at 293. On the first attempted-murder count, the defendant was sentenced to fifteen years to life and to a consecutive term of twenty-five years to life for the corresponding firearm enhancement. *Id.* On the second attempted murder count, he was sentenced to an additional consecutive term of fifteen years to life, plus twenty years for the corresponding firearm enhancement. *Id.* On the third attempted-murder count he was sentenced to a consecutive term of fifteen years to life, plus twenty years for the corresponding firearm enhancement. *Id.*

148. *Id.* at 295; see also *id.* at 294 (explaining that by extending *Graham*'s reasoning to homicide offenders, the Court in *Miller v. Alabama* "made it clear that *Graham*'s 'flat ban' on life without parole sentences for juvenile offenders in nonhomicide cases applies to their sentencing equation regardless of . . . how a sentencing court structures the life without parole sentence" (citing *Miller v. Alabama*, 132 S. Ct. 2455, 2465, 2469 (2012))).

149. *Id.* at 295.

150. *Id.* (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010)).

151. *Id.* (quoting *Graham*, 130 S. Ct. at 2029).

152. *People v. Rainer*, No. 10CA2414, 2013 WL 1490107, at *1, *12 (Colo. App. Apr. 11, 2013).

"two counts of attempted first degree murder, two counts of first degree assault, one count of first degree burglary, one count of aggravated robbery, and sentence enhancement counts for crimes of violence."¹⁵³ The court concluded that Rainer's aggregate sentence "qualifie[d] as an unconstitutional de facto sentence to life without parole"¹⁵⁴ because it did not "offer him . . . a meaningful opportunity to obtain release before the end of his expected life span"¹⁵⁵ Rainer would become eligible for parole at the age of seventy-five, beyond his life expectancy of 63.8 to 72 years, as projected by the Centers for Disease Control.¹⁵⁶ Rainer further argued that even if he were still alive at the time of his parole eligibility, his release would be unlikely because the Colorado State Board of Parole denies parole to nearly ninety percent of offenders upon initial eligibility.¹⁵⁷ The court next considered the *Graham* opinion and the subsequent case law that demonstrate that "the Supreme Court has continued on its decisional trend of providing more constitutional protections for juvenile offenders."¹⁵⁸ The issue being of first impression, the court summarized the rulings of other jurisdictions and found persuasive "the reasoning of those cases that have extended *Graham* to de facto sentences to life without parole."¹⁵⁹ The court also relied on the "broad nature of *Graham*'s directives," noting "the Court did not employ a rigid or formalistic set of rules designed to narrow the application of its holding"; rather, the Court "employed expansive language."¹⁶⁰ Lastly, the court "[found] it instructive that . . . the Colorado General Assembly, both before and after *Graham*, has adopted legislation aligned with the principles articulated in *Roper*, *Graham*, and *Miller*."¹⁶¹ Accordingly, the court vacated Rainer's 112-year sentence on the ground that it was the functional equivalent of a life sentence without parole that "improperly denie[d] [him] a chance to demonstrate growth and maturity," in violation of the Eighth Amendment and *Graham*.¹⁶²

However, the same day that it announced *Rainer*, the court in *People v. Lucero* affirmed a juvenile nonhomicide offender's eighty-four-year sentence upon concluding that it did not constitute a life

153. *Id.* at *1. Rainer, at the age of seventeen, shot two people multiple times while he burglarized an apartment and stole a stereo. *Id.* Rainer's original sentence was 224 years—the trial court imposed the maximum sentence for each count and ordered them to be served consecutively. *Id.* The appellate court vacated the consecutive sentences for some of the convictions; on remand, Rainer was sentenced to an aggregate term of 112 years. *Id.*

154. *Id.* at *12.

155. *Id.* at *6 (internal quotation marks omitted). The court first concluded that *Graham* applies retroactively. *Id.* at *2.

156. *Id.* at *6, *12.

157. *Id.*

158. *Id.* at *9.

159. *Id.* at *9-12, *13.

160. *Id.* at *13-14.

161. *Id.* at *14.

162. *Id.* at *15 (internal quotation omitted).

sentence without parole.¹⁶³ Lucero was convicted of “conspiracy to commit first degree murder, attempted first degree murder, and two counts of second degree assault” based on offenses he committed at the age of fifteen.¹⁶⁴ His consecutive prison terms totaled eighty-four years.¹⁶⁵ The court acknowledged *Rainer*, but concluded that Lucero’s sentence did not constitute a life sentence without parole because Lucero would be eligible for parole at the age of fifty-seven, “well within” his life expectancy of seventy-five years.¹⁶⁶ Thus, the court affirmed Lucero’s sentence on the ground that it “provides for a meaningful opportunity for release within his natural life span.”¹⁶⁷

(c) *Florida First District Court of Appeal*

According to the First District Court of Appeal of Florida, *Graham* is applicable to a term-of-years sentence that constitutes de facto life without parole.¹⁶⁸ In turn, the court defines a de facto life sentence—also known as a term-of-years sentence that is the functional equivalent of a life sentence—as one that exceeds the defendant’s life expectancy.¹⁶⁹

In *Thomas v. State*, the First District Court of Appeal considered a seventeen-year-old offender’s concurrent fifty-year sentences for armed robbery and aggravated battery.¹⁷⁰ The court concluded that given Thomas’s life expectancy of 70.2 years and his release in his late sixties, his sentence was not the functional equivalent of life without parole.¹⁷¹ However, the court conceded that “at some point, a term-of-years sentence may become the functional equivalent of a life sentence”¹⁷² The court “encourage[d] the Legislature to consider modifying Florida’s current sentencing scheme to include a mechanism for review of juvenile offenders sentenced as adults as discussed in *Graham*.”¹⁷³

The court decided *Gridine v. State* on the same day as *Thomas v. State*.¹⁷⁴ In *Gridine*, the fourteen-year-old offender was sentenced to seventy years imprisonment for attempted first-degree murder and to

163. *People v. Lucero*, No. 11CA2030, 2013 WL 1459477, at *1 (Colo. App. Apr. 11, 2013).

164. *Id.*

165. *Id.*

166. *Id.* at *3. The court declined to consider Defendant’s argument that “serving 20 years in prison takes 16 years off life expectancy” because he failed to raise it in the trial court. *Id.* at *4.

167. *Id.* at *4, *5.

168. *See Thomas v. State*, 78 So. 3d 644, 646 (Fla. 1st DCA 2011) (per curiam).

169. *See id.* at 645-46.

170. *Id.* at 645.

171. *Id.* at 646.

172. *Id.*

173. *Id.* at 647.

174. *Gridine v. State*, 89 So. 3d 909 (Fla. 1st DCA 2011).

a concurrent twenty-five-year term for attempted armed robbery.¹⁷⁵ The court affirmed Gridine’s seventy-year sentence on the ground that the *Graham* holding was limited to a juvenile sentence of “‘life without parole solely for a nonhomicide offense.’”¹⁷⁶ The court analogized to *Thomas* and recognized that “at some point, a term-of-years sentence may become the functional equivalent of a life sentence,” but concluded that Gridine’s seventy-year sentence did not constitute a de facto life sentence.¹⁷⁷ The court certified the following question to the Florida Supreme Court as being of great public importance: “Does the United States Supreme Court decision in *Graham v. Florida* prohibit sentencing a fourteen-year-old to a prison sentence of seventy years for the crime of attempted first-degree murder?”¹⁷⁸ The Florida Supreme Court accepted jurisdiction.¹⁷⁹

Subsequently, in *Floyd v. State*, the court held unconstitutional a seventeen-year-old offender’s aggregate sentence of eighty years imprisonment imposed for two counts of armed robbery.¹⁸⁰ The court concluded that because Floyd’s sentence exceeded his life expectancy, even when accounting for the possibility of early release pursuant to gaintime, it was “the functional equivalent of a life without parole sentence and will not provide him with a meaningful or realistic opportunity to obtain release.”¹⁸¹ Accordingly, the court remanded the case for resentencing, and urged the legislature to follow *Graham*’s guidance and “‘explore the means and mechanisms for compliance.’”¹⁸²

Thereafter, in *Smith v. State* the court considered a seventeen-year-old offender’s aggregate sentence of eighty years imprisonment, imposed in two separate cases involving a total of eight offenses.¹⁸³ The court concluded that Smith’s eighty-year sentence was not the functional equivalent of life without parole because pursuant to the applicable gaintime statutes he could become eligible for release sig-

175. *Id.* at 910.

176. *Id.* at 911 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2023 (2010)).

177. *Id.* Unlike in *Thomas*, in *Gridine* the court did not discuss the defendant’s life expectancy. *See id.*

178. *Gridine v. State*, 93 So. 3d 360, 361 (Fla. 1st DCA 2012) (internal citation omitted).

179. *Gridine v. State*, No. SC12-1223, 2012 WL 4839014 (Fla. Oct. 11, 2012).

180. *Floyd v. State*, 87 So. 3d 45, 45 (Fla. 1st DCA 2012) (per curiam) (noting that the defendant was initially sentenced to life imprisonment, but pursuant to *Graham* he was resentenced to two consecutive forty-year terms of imprisonment).

181. *Id.* at 46-47. Because Florida has abolished its parole system, a prisoner’s sentence may be shortened only through incentive and meritorious gaintime, and a defendant must serve at least eighty-five percent of the prison sentence. *Id.* at 46. Even if Floyd received the maximum gaintime, he would not be released until the age of eighty-five. *Id.*

182. *Id.* at 47 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010)).

183. *Smith v. State*, 93 So. 3d 371, 372 (Fla. 1st DCA 2012) (noting that the defendant was convicted of two counts of sexual battery; two counts of burglary; and one count each of aggravated assault, kidnapping, possession of a weapon during the commission of a felony, and possession of burglary tools, all committed within a two-day period).

nificantly before he turns eighty-one years old.¹⁸⁴ Thus, Smith's eighty-year sentence was constitutional because, through the availability of gaintime, he was provided with a " 'meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation,' " as required by *Graham*.¹⁸⁵

Most recently, in *Adams v. State*, the court reluctantly held *Graham* applicable to a lengthy term-of-years sentence that constituted de facto life without parole.¹⁸⁶ Adams was sixteen years old when he committed the offenses underlying his attempted first-degree murder, armed burglary, and armed robbery convictions.¹⁸⁷ He was sentenced to sixty years imprisonment.¹⁸⁸ The court summarized its precedent as follows: "*Graham* applies not only to life without parole sentences, but also to lengthy term-of-years sentences that amount to de facto life sentences," and "a de facto life sentence is one that exceeds the defendant's life expectancy."¹⁸⁹ Adams's sixty-year sentence constituted a de facto life sentence because he would not become eligible for release during his life expectancy.¹⁹⁰ Therefore, Adams's sentence was unconstitutional pursuant to *Graham*.¹⁹¹ The court certified conflict with *Henry v. State* and certified the following questions to the Florida Supreme Court as being "of great public importance": (1) "Does *Graham v. Florida* apply [to lengthy] term-of-years sentences that amount to de facto life sentences?" and (2) "if so, at what point does a term-of-years sentence become a de facto life sentence?"¹⁹²

(d) *United States District Court for the Southern District of Florida*

The U.S. District Court for the Southern District of Florida held *Graham* applicable to a lengthy term-of-years-without-parole juve-

184. *Id.* at 374. Pursuant to the gaintime statutes of 1985, the year Smith's sentences were imposed, Smith could become eligible for release after serving significantly fewer than sixty-three years. *Id.* Interestingly, the court did not discuss the defendant's actual life expectancy. *See id.* at 374-75.

185. *Id.* at 375 (quoting *Graham*, 130 S. Ct. at 2030).

186. *Adams v. State*, No. 1D11-3225, 2012 WL 3193932, at *1, *2 (Fla. 1st DCA Aug. 8, 2012). The court noted that if it were not for its precedent, it would have affirmed the defendant's sentence pursuant to the Fifth District Court's reasoning in *Henry v. State*, 82 So. 3d 1084 (Fla. 5th DCA 2012). *Id.* at *1. The court also quoted *Alvarez v. State*, 358 So. 2d 10, 12 (Fla. 1978), where the Florida Supreme Court rejected the notion "that the defendant's life expectancy should be taken into account . . . because '[a]ny sentence, no matter how short, may eventually extend beyond the life of a prisoner.'" *Id.* at *2.

187. *Id.* at *1.

188. *Id.*

189. *Id.* at *2.

190. *Id.* (explaining that Adams was required to serve at least 58.5 years in prison before becoming eligible for release; by then, he would be almost seventy-six years old, which is beyond his life expectancy as shown by the National Vital Statistics Reports).

191. *Id.*

192. *Id.* at *2-3 (internal citation omitted).

nile sentence.¹⁹³ In *United States v. Mathurin*, the court held unconstitutional a juvenile’s aggregate sentence of 307 years without parole imposed for numerous nonhomicide offenses.¹⁹⁴ Specifically, the defendant, whose age is unclear, was sentenced to consecutive terms of imprisonment for conspiracy to commit robbery, conspiracy to carry a firearm in furtherance of a crime of violence, attempted robbery, thirteen counts of possession of a firearm in furtherance of a crime of violence, thirteen counts of robbery, and two counts of carjacking.¹⁹⁵ The court reasoned that the sentence did not provide the juvenile with the requisite opportunity to obtain release upon demonstrated maturity and rehabilitation.¹⁹⁶

(e) United States District Court for the Eastern District of Pennsylvania

The U.S. District Court for the Eastern District of Pennsylvania held that *Graham* applies to a lengthy term-of-years sentence that fails to provide a juvenile offender a meaningful opportunity for release during his lifetime.¹⁹⁷ In *Thomas v. Pennsylvania*, the defendant was convicted of “rape, indecent assault, and multiple counts of armed robbery and burglary” for offenses he committed at the ages of fourteen and fifteen.¹⁹⁸ Thomas’s sentence was 65 to 150 years of imprisonment, with parole eligibility at the age of eighty-three.¹⁹⁹ Thomas filed a petition for writ of habeas corpus and argued that his sentence violated *Graham*. The State agreed, and the magistrate judge remanded the case for resentencing.²⁰⁰ The district court agreed and concluded that Thomas’s parole eligibility “more than a decade beyond his life expectancy” contravenes *Graham*’s “meaningful opportunity” mandate.²⁰¹ The court reasoned as follows:

This Court does not believe that the Supreme Court’s analysis would change simply because a sentence is labeled a term-of-years sentence rather than a life sentence if that term-of[-]years sentence does not provide a meaningful opportunity for parole in a ju-

193. *United States v. Mathurin*, No. 09-21075-Cr-COOKE, 2011 WL 2580775, at *3 (S.D. Fla. June 29, 2011).

194. *Id.* at *1-3, *6 (noting that under the applicable federal statute, the sentences were required to run consecutively; in addition, Congress had abolished parole for offenses committed after November 1987).

195. *Id.* at *1.

196. *Id.* at *3. The court held that the consecutive sentencing statutory provision was unconstitutional as applied to Mathurin and resentenced him to 492 months; he may become eligible for release around the age of 53. *Id.* at *3, *6.

197. *Thomas v. Pennsylvania*, No. 10-4537, 2012 WL 6678686, at *2 (E.D. Pa. Dec. 21, 2012).

198. *Id.* at *1.

199. *Id.*

200. *Id.*

201. *Id.* at *2.

venile's lifetime. The Court's concerns about juvenile culpability and inadequate penological justification apply equally in both situations, and there is no basis to distinguish sentences based on their label. To find otherwise would degrade the holding of the Supreme Court. Therefore, this Court finds that the sentence imposed in this case, though a term-of-years sentence, violates *Graham* as it provides no meaningful opportunity to obtain release, based upon demonstrated maturity and rehabilitation, during Thomas's expected lifetime. Accordingly, the Court finds that the sentence imposed amounts to cruel and unusual punishment in violation of the Eighth Amendment.²⁰²

B. Problems With the Current Approaches to Graham's Applicability to Term-of-Years Sentences

1. Holding Graham Inapplicable Nullifies a Constitutional Rule

The Court of Appeals of Arizona; the Fourth, Fifth, and Second District Courts of Appeal of Florida; the Supreme Court of Georgia; the Supreme Court of Louisiana; the First District Court of Appeals of Texas; and the United States Court of Appeals for the Sixth Circuit have erroneously concluded that *Graham* is inapplicable to the lengthy term-of-years-without-parole sentences of juvenile nonhomicide offenders.²⁰³ The main rationale of these courts is flawed, and their holding violates *Graham* and enables courts to circumvent the Supreme Court's interpretation of the Eighth Amendment.

The aforementioned courts have one rationale in common: the Supreme Court explicitly limited *Graham*'s holding to "life without parole" sentences.²⁰⁴ By strictly adhering to the language of the *Graham* holding, the courts reach a conclusion that does not follow logically from the premise. *Graham* was technically sentenced to "life imprisonment," not "life without parole."²⁰⁵ Yet, the *Graham* Court framed the issue and holding in terms of "life without parole" because it recognized it as *Graham*'s practical sentence,²⁰⁶ given that Florida had abolished parole.²⁰⁷ Similarly, a court that imposes a lengthy term-of-years sentence does not technically render a "life" sentence; nevertheless, the lengthy term is a practical life sentence when in reality it

202. *Id.*

203. See *Bunch v. Smith*, 685 F.3d 546, 553 (6th Cir. 2012), *cert. denied*, *Bunch v. Bobby*, 133 S. Ct. 1996 (2013); *State v. Kasic*, 265 P.3d 410, 415 (Ariz. Ct. App. 2011); *Walle v. State*, 99 So. 3d 967, 971, 973 (Fla. 2d DCA 2012); *Henry v. State*, 82 So. 3d 1084, 1087, 1089 (Fla. 5th DCA 2012); *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011); *Burnell v. State*, No. 01-10-00214-CR, 2012 WL 29200, at *8-9 (Tex. Ct. App. Jan. 5, 2012). See also *supra* Part III.A.1.

204. See cases cited *supra* note 203.

205. *Graham v. Florida*, 130 S. Ct. 2011, 2020 (2010).

206. See *id.* at 2017-18, 2030.

207. *Id.* at 2020.

ensures that the defendant will be incarcerated until his death. As one appellate court noted, “[f]inding a determinate sentence exceeding a juvenile’s life expectancy constitutional because it is not labeled an [sic] LWOP [life without parole] sentence is Orwellian. Simply put, a distinction based on changing a label . . . is arbitrary and baseless.”²⁰⁸ Courts ought not to violate a constitutional rule by engaging in a simple play on words.

More significantly, rejection of *Graham*’s applicability to lengthy term-of-years-without-parole sentences violates *Graham* because it is wholly irreconcilable with the spirit and reasoning of the opinion. The *Graham* Court made clear that juveniles are constitutionally different from adults because the characteristics of youth render them less morally culpable;²⁰⁹ additionally, juveniles’ incorrigibility cannot be determined reliably at the outset, and they are more amenable to reform.²¹⁰ Moreover, a life without parole sentence is the second harshest punishment;²¹¹ its imposition on a juvenile nonhomicide offender cannot be justified by any penological theory²¹² and “improperly denies the juvenile offender a chance to demonstrate growth and maturity.”²¹³ A lengthy term-of-years-without-parole sentence has precisely the same features that *Graham* prohibits: it imposes the second-harshest punishment on an offender whose culpability is diminished by his or her youth, it does so in the absence of sufficient penological justification, and it deprives the juvenile offender of a meaningful opportunity to obtain release based on demonstrated reform. Thus, the rejection of *Graham*’s applicability to lengthy term-of-years sentences is the antithesis of the *Graham* Court’s mandate and reasoning; relatedly, it enables courts to circumvent and nullify the *Graham* holding. As one author explained,

[w]hat difference is there really between 120 years and life besides semantics, because the reality is the same either way. All sentencing courts would have to do is stop issuing LWOP and instead start sentencing those same juveniles to 100 years, and the problem is solved. Gone would be the idea that juveniles are different, less culpable, and more deserving of a meaningful opportunity for

208. *People v. De Jesús Nuñez*, 125 Cal. Rptr. 3d 616, 624 (Cal. Ct. App. 2011), *review dismissed by People v. Nunez*, 287 P.3d 71 (Cal. 2012) (citing *People v. Caballero*, 282 P.3d 291 (Cal. 2012)).

209. *Graham*, 130 S. Ct. at 2026-28, 2030; *see also* *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (noting that “*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing”); *Roper v. Simmons*, 543 U.S. 551, 569-70, 578 (2005).

210. *Graham*, 130 S. Ct. at 2026.

211. *Id.* at 2027.

212. *Id.* at 2028-30.

213. *Id.* at 2029.

release. Gone would be the incentive to rehabilitate. Gone would be *Graham*.²¹⁴

Lastly, some courts reason, and others certainly contemplate, that extending *Graham* to term-of-years sentences would generate a multitude of line-drawing problems.²¹⁵ Undeniably, holding *Graham* applicable to lengthy term-of-years sentences would trigger significant questions. For example, at what point does a term-of-years sentence become unconstitutional? Must courts account for gaintime? In the event of multiple convictions, does *Graham* apply to the individual or aggregate sentence? If *Graham* applies to the aggregate sentence and multiple cases are involved, which jurisdiction's sentencing authority is restricted, and which victim's rights are not fully vindicated? While these are legitimate concerns, they do not justify the abrogation of the Supreme Court's decree when a logical solution is available. That solution is to provide all juvenile nonhomicide offenders with the opportunity for parole or sentencing review hearings. As discussed in Part IV, *Graham*, even when its holding is read narrowly and in a technical sense, requires states to make parole or sentencing review hearings available in order to provide juvenile nonhomicide offenders who are sentenced to life imprisonment with the requisite opportunity to obtain release based on demonstrated reform. In turn, the availability of such a mechanism should be extended to all juvenile nonhomicide offenders, thereby eliminating the line-drawing concerns of courts that insist on circumventing *Graham* by refusing to apply it to term-of-years sentences.

2. *Holding Graham Applicable is Proper, but Reliance on Life Expectancy Precludes Full Compliance*

While the Supreme Court of California, the Colorado Court of Appeals, the First District Court of Appeal of Florida, the United States District Court for the Southern District of Florida, and the United States District Court for the Eastern District of Pennsylvania have properly held that *Graham* applies to the lengthy term-of-years-without-parole sentences of juvenile nonhomicide offenders, their approach falls short of complying with *Graham*'s mandate. Courts that apply *Graham* to term-of-years sentences look to the defendant's life expectancy and projected release eligibility. If there is no possibility for release during the offender's life expectancy, as determined by the National Vital Statistics Report, the term-of-years sentence is uncon-

214. Leanne Palmer, Note, *Juvenile Sentencing in the Wake of Graham v. Florida: A Look Into Uncharted Territory*, 17 BARRY L. REV. 133, 147 (2011).

215. See, e.g., *Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012), cert. denied, *Bunch v. Bobby*, 133 S. Ct. 1996 (2013); *Walle v. State*, 99 So. 3d 967, 972 (Fla. 2d DCA 2012); *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. 5th DCA 2012).

stitutional, for it is the functional equivalent of life without parole.²¹⁶ At first glance, one cannot argue with the logic of relying on life expectancy statistics as a method of determining the point at which a term-of-years sentence becomes the functional equivalent of life without parole. However, there are significant problems with this approach in the context of sentencing and in light of *Graham*.

The greatest, and fatal, deficiency of the life expectancy approach is that it fails to comply with *Graham*’s mandate. In *Graham*, the Court’s disdain for the life without parole sentence stemmed from its findings that the sentence denies any hope of release, “forswears altogether the rehabilitative ideal,”²¹⁷ and “improperly denies the juvenile offender a chance to demonstrate growth and maturity.”²¹⁸ Accordingly, the Court held that states are constitutionally required to provide juvenile nonhomicide offenders with some “realistic,”²¹⁹ “meaningful opportunity to obtain release *based on* demonstrated maturity and rehabilitation.”²²⁰ The life expectancy approach deprives juvenile offenders of this requisite meaningful opportunity because it affords no possibility of release until a specified time, regardless of reform. To demonstrate the disconnect between the life expectancy approach and *Graham*’s mandate, consider the following: A term-of-years sentence that provides an opportunity for release just before the juvenile offender’s expected death, either pursuant to gain-time or upon the expiration of the sentence, satisfies the life expectancy approach because technically the offender is not required to spend his “entire” life in prison. Yet it fails *Graham*’s mandate because it deprives the offender of a meaningful opportunity to demonstrate he has been reformed and thus should be released early. Providing for the possibility of release in time for the offender to die as a free man or woman is hardly a “meaningful opportunity” as contemplated by the *Graham* Court.²²¹ As one appellate judge explained:

[The life expectancy] approach misses the mark entirely. . . . [T]he question is not whether the defendant will have a significant part of his life remaining at the end of the sentence; rather, it is whether the defendant will have a reasonable opportunity to show that

216. See, e.g., *People v. Mendez*, 114 Cal. Rptr. 3d 870, 882 (Cal. Ct. App. 2010); *People v. Lucero*, No. 11CA2030, 2013 WL 1459477, at *1 (Colo. App. Apr. 11, 2013); *People v. Rainer*, No. 10CA2414, 2013 WL 1490107, at *1, *12 (Colo. App. Apr. 11, 2013); *Adams v. State*, No. 1D11-3225, 2012 WL 3193932, at *2 (Fla. 1st DCA Aug. 8, 2012).

217. *Graham*, 130 S. Ct. at 2030.

218. *Id.* at 2029.

219. *Id.* at 2034.

220. *Id.* at 2030 (emphasis added).

221. To the contrary, it is arguably cruel to eject into society a person who spent most of his life imprisoned, thereby causing him to spend his remaining days struggling to survive for he probably lacks sufficient social and vocational skills, savings, access to affordable health care, a job, a home, a family, friends, or any other resources or support systems.

he has been rehabilitated during the course of the sentence and is therefore deserving of release at some point before the sentence expires.

....

In contrast, the term of years sentences we have approved in this case do not afford the defendant that opportunity. He will be released at a fixed point in the future, and the timing of his release will have no connection with his behavior in prison or any efforts he might make to rehabilitate himself. He might be able to establish his rehabilitation next week, next month, or next year, but it will make no difference.²²²

Thus, the life expectancy approach is a wholly inadequate yardstick for achieving compliance with *Graham*. Instead, the proper measure must be whether the offender has a meaningful opportunity to demonstrate maturity and rehabilitation and thereby obtain early release.

In addition to violating *Graham*'s mandate, the life expectancy approach poses problems of its own. For one, life expectancy calculations are based on the defendant's race, sex, and year of birth or current age.²²³ These are all factors that sentencing courts are generally prohibited from taking into consideration.²²⁴ Moreover, if a court is truly attempting to determine a defendant's life expectancy, why not also consider factors such as the offender's health, personal medical history, family medical history, national origin, and the toll imprisonment will have on life expectancy? Indubitably, accounting for such factors would be impractical, if not impossible, for it would create a new line of problems and transform the life determination into a trial of its own. The Florida Supreme Court has itself stated:

We reject the notion that an individual's life expectancy should be used, or was intended by the Legislature to be used, to mark the

222. *Smith v. State*, 93 So. 3d 371, 375-77 (Fla. 1st DCA 2012) (Padovano, J., concurring).

223. See, e.g., *People v. Mendez*, 114 Cal. Rptr. 3d 870, 882 (Cal. Ct. App. 2010); *People v. Lucero*, No. 11CA2030, 2013 WL 1459477, at *1, *3 (Colo. App. Apr. 11, 2013); *Henry v. State*, 82 So. 3d 1084, 1086, 1089 (Fla. 5th DCA 2012); Donna L. Hoyert & Jiaquan Xu, *Deaths: Preliminary Data for 2011*, NAT'L VITAL STAT. REP., Oct. 10, 2012, at 1, 26-28, available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf.

224. See, e.g., 28 U.S.C. § 994(d) (2006) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."); FLA. STAT. § 921.002(1)(a) (2012) ("Sentencing is neutral with respect to race, gender, and social and economic status."); MONT. CODE ANN. § 46-18-101(3)(c) (2005) ("Sentencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status."); OHIO REV. CODE ANN. § 2929.11(C) (West 2011) ("A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender."); TENN. CODE ANN. § 40-35-102(4) (West 2012) ("Sentencing should exclude all considerations respecting race, gender, creed, religion, national origin and social status of the individual[.]"); FLA. R. CRIM. P. 3.701(b)(1) (2012) ("Sentencing should be neutral with respect to race, gender, and social and economic status.").

longest term which a particular defendant should serve. Any sentence, no matter how short, may eventually extend beyond the life of a prisoner. Mortality and life expectancy are irrelevant to limitations on the terms of incarceration set by the Legislature for criminal misconduct.²²⁵

Lastly, the life expectancy approach enables courts to render *Graham* meaningless by imposing term-of-years sentences that provide for the possibility of release just before offenders’ expected deaths. For instance, a sentence that provides for the possibility of release at the age of sixty-nine would technically not be the functional equivalent of life without parole for a juvenile offender whose life expectancy is seventy years. This empty distinction is analogous to a 150-year sentence imposed by a court that rejects *Graham*’s applicability to term-of-years sentences—both tactics allow courts to comply with the law in a highly technical sense, while in practice engage in grave violations.

In sum, holding *Graham* applicable to lengthy term-of-years sentences pursuant to the life expectancy approach is a better alternative to holding *Graham* inapplicable and thereby disregarding the *Graham* Court’s pronouncement in its entirety. Nevertheless, the life expectancy approach is inadequate because it fails to comply with *Graham*’s mandate of providing a meaningful opportunity to obtain release based on demonstrated reform, and it unnecessarily implicates line-drawing problems.

IV. PROPER APPROACH: *GRAHAM* MANDATES PAROLE OR SENTENCING HEARINGS, APPLIES TO ALL TERM-OF-YEARS SENTENCES, AND REQUIRES REHABILITATIVE SERVICES

Section A demonstrates that *Graham* requires states to make parole or sentencing review hearings available to juvenile nonhomicide offenders who are sentenced to life imprisonment. Section B reiterates why *Graham* applies to lengthy term-of-years sentences, restates the reasons for rejecting the life expectancy approach, and proposes that the availability of parole or sentencing review hearings must be extended to all juvenile nonhomicide offenders who are sentenced to term-of-years sentences. Section C illustrates that *Graham* also requires states to provide rehabilitative prison services to juvenile nonhomicide offenders. Section D provides a brief overview of Florida’s failed legislative efforts to comply with *Graham*, discusses the courts’ role in ensuring compliance with the Supreme Court’s mandate, and provides guidance for future efforts.

225. *Alvarez v. State*, 358 So. 2d 10, 12 (Fla. 1978) (footnote omitted).

A. *Graham* Mandates Parole or Sentencing Review Hearings

Pursuant to *Graham*, states must provide juvenile nonhomicide offenders sentenced to life imprisonment with “some meaningful opportunity to obtain release *based on* demonstrated maturity and rehabilitation.”²²⁶ States need not guarantee juvenile offenders’ eventual freedom, but may not “mak[e] the judgment at the outset that those offenders never will be fit to reenter society.”²²⁷ The *Graham* Court determined that a life without parole sentence “improperly denies the juvenile offender a chance to demonstrate growth and maturity.”²²⁸ The Court explained that the sentence “ ‘means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.’ ”²²⁹ In addition, the incorrigibility of a juvenile nonhomicide offender cannot be accurately assessed at the outset, and juveniles are capable of reform.²³⁰

It is thus clear that the *Graham* Court requires states to provide juvenile nonhomicide offenders with a meaningful opportunity to demonstrate maturity and rehabilitation and thereby obtain release from life imprisonment. In other words, the Court seems to require the availability of parole.²³¹ Indeed, the “meaningful opportunity” standard was coined by *Graham*’s counsel, Mr. Gowdy, in the context of the availability of parole.²³² The standard evolved during oral argument as follows:

Justice Samuel Alito: --If we agree with you, at what point must the parole consideration be given? There is a suggestion in your brief that maybe the Colorado statute, which says that a person

226. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010) (emphasis added).

227. *Id.*

228. *Id.* at 2029.

229. *Id.* at 2027 (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)).

230. *Id.* at 2026-27.

231. See, e.g., *id.* at 2057 (Thomas, J., dissenting) (“And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel?”); *Smith v. State*, 93 So. 3d 371, 376 (Fla. 1st DCA 2012) (Padovano, J., concurring) (“[T]he only way the courts can carry out the mandate of the *Graham* decision is to ensure that a juvenile offender is eligible for parole or some equivalent of parole.”); *Gridine v. State*, 89 So. 3d 909, 911 (Fla. 1st DCA 2011) (Wolf, J., dissenting) (“[T]he only logical way to address the concerns expressed by the United States Supreme Court in *Graham v. Florida* is to provide parole opportunities for juveniles.” (citation omitted)); Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51, 77 (2012) (stating that “parole must be available under state law in order to comport with *Graham*’s requirements”); Leslie Patrice Wallace, *“And I Don’t Know Why It Is That You Threw Your Life Away”: Abolishing Life Without Parole, the Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 68 (2010) (concluding that *Graham*’s mandate requires states to have “an active parole board and rehabilitative measures in place”); *id.* at 74 (suggesting incremental sentencing reviews by parole boards).

232. See Wallace, *supra* note 231, at 65-66.

can get parole consideration after 40 years, would be constitutional. Is that your position?

Mr. Gowdy: Your Honor, our position is that it should be left up to the States to decide. We think that the -- the Colorado provision would probably be constitutional. We will have to see what different States do. I mean, but -- but, yes, even that long amount of time would give at least some hope to the adolescent offender.

Chief Justice John G. Roberts: What about -- what if it's the -- pursuant to the usual State parole system, and it turns out that grants parole to 1 out of 20 applicants?

Mr. Gowdy: I think all that would have to be required, Your Honor -- I think that would be sufficient. All that would have to be required is a **meaningful opportunity** to the adolescent offender to demonstrate that he has in fact changed, reformed, and is now fit to live in society. It -- that's all. That's all we are asking for. We are not asking that it be automatic right to get back out.²³³

The Court's holding, however, does not expressly mandate the availability of parole and instead requires states to devise the method of compliance.²³⁴ This allocation of responsibility was likely due to the Court's lack of authority to order states to make parole available.²³⁵ Accordingly, *Graham* permits states to devise alternative methods.²³⁶ Nonetheless, aside from sentencing review hearings, it is difficult to conceive of a viable alternative to parole that would satisfy *Graham*'s requirements.

Sentencing review hearings by trial courts could satisfy *Graham*'s mandate and constitute an alternative approach. To comply with *Graham*'s meaningful opportunity requirement, the hearing would function much the same way as parole review. Once the offender has served a certain number of years or a given portion of his sentence, or reached a specific age, he could be entitled to a sentencing review hearing by the trial court that imposed the original sentence. The

233. Transcript of Oral Argument, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412) (emphasis added), available at http://www.oyez.org/cases/2000-2009/2009/2009_08_7412.

234. *Graham*, 130 S. Ct. at 2030 ("It is for the State, in the first instance, to explore the means and mechanisms for compliance.").

235. See, e.g., *Vitek v. Jones*, 445 U.S. 480, 488 (1980) ("There is no 'constitutional or inherent right' to parole . . ." (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979))).

236. See Gerard Glynn & Ilona Vila, *What States Should Do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV. 310, 313 (2012) ("[T]here is a clear suggestion that an opportunity for release will be through parole or resentencing."); Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 12 (2011) ("How, therefore, must the juvenile offender obtain opportunity for release remains the ensuing question. The answer was intentionally left to the province of the States to develop the 'means and mechanisms for compliance.'").

court's task would be to determine whether the juvenile offender has achieved maturity and reform and thus qualifies for release. If the court finds that the offender has been rehabilitated, the original sentence may be reduced. If the court finds that the offender has not been reformed, release would be denied and the offender would be entitled to sentencing review hearings in specific intervals thereafter. Currently, no alternative methods of compliance—besides parole and sentencing review hearings—have been proposed. Therefore, pursuant to *Graham*, states must make parole or sentencing review hearings available to juvenile nonhomicide offenders serving a life sentence in order to provide them with a meaningful opportunity to demonstrate they have been reformed and thus should be granted release.

B. Graham Applies to All Juvenile Nonhomicide Offenders' Term-of-Years Sentences

This Note posits that *Graham* applies to the term-of-years sentences of juvenile nonhomicide offenders and that the availability of parole or sentencing review hearings should be extended to all such sentences. *Graham*'s holding is applicable to lengthy term-of-years-without-parole sentences for the three main reasons discussed in Part III.²³⁷ First, it is illogical to fixate on a strictly literal reading of *Graham*'s holding when the Court implicitly rejected a technical reading of *Graham*'s sentence and instead focused on its practical effect.²³⁸ Second, the rejection of *Graham*'s applicability to term-of-years sentences enables courts to disregard the Supreme Court's reasoning and to further the evils the Supreme Court sought to prevent; that is, it permits the disguised imposition of the second-harshes punishment on an offender whose culpability is diminished by the characteristics of youth, it lacks sufficient penological justification, and it deprives the juvenile offender of an opportunity to obtain release based on demonstrated reform.²³⁹ Third, courts and legislatures can avoid the line-drawing problems that arise from *Graham*'s application to term-of-years sentences by extending the availability of parole or sentencing review hearings to all juvenile nonhomicide offenders.

Moreover, the life expectancy approach currently espoused by those courts that properly deem *Graham* applicable to term-of-years sentences fails to comply with *Graham*, as discussed in Part III.²⁴⁰ The fatal weakness of the life expectancy approach is that it provides for the possibility of release at a fixed time, sometime before and however close to the offender's expected death, irrespective of whether the offender has been reformed. Moreover, the approach forces

237. See discussion *supra* Part III.B.1.

238. See *Graham*, 130 S. Ct. at 2017-18, 2020, 2030.

239. See *id.* at 2026-27, 2028, 2030, 2032-33.

240. See discussion *supra* Part III.B.2.

sentencing courts to rely on factors they are generally prohibited from considering, such as race, sex, and age. At the same time, it fails to account for numerous factors that affect an offender’s actual life expectancy, such as personal and family medical history, national origin, and prison conditions. Lastly, the approach enables courts to circumvent *Graham* by imposing term-of-years sentences that provide for the possibility of release just before the juvenile offenders’ expected deaths and no opportunity to obtain early release based on demonstrated reform. Thus, the life expectancy approach is inadequate.

The proper approach is to hold *Graham* applicable to a juvenile nonhomicide offender’s term-of-years sentence and to make the parole or sentencing review hearing available regardless of the sentence’s length.²⁴¹ This approach would prevent courts from circumventing the Supreme Court’s pronouncement that the Eighth Amendment especially protects juveniles because they are constitutionally different from adults. Significantly, the proposed approach would ensure compliance with *Graham*’s mandate that states must provide juvenile nonhomicide offenders with a meaningful opportunity to obtain release based on demonstrated reform. At the same time, it would obviate the need to rely on the problematic life expectancy method.

Critics may argue that *Graham*’s categorical ban is inappropriate because what is at issue is a challenge to lengthy term-of-years-without-parole sentences in general, not to a particular type of sentence.²⁴² However, this argument ignores the fact that these sentences are being challenged as they “appl[y] to an entire class of offenders who have committed a range of crimes.”²⁴³ Thus, comparison of the punishment’s severity to the crime’s gravity would be fruitless because the challenge does not involve a particular defendant’s sentence, but a whole sentencing practice.²⁴⁴ Accordingly, the categorical approach is appropriate because it was applied analogously in *Graham* and is necessary because the proportionality approach would be unhelpful. Critics may further contend that the proposed approach is not sufficiently retributive, diminishes deterrence, and might increase the recidivism rate. However, these arguments must fail because, as the Court emphasized, a state need not guarantee a juvenile offender’s eventual release.²⁴⁵ Additionally, given that juvenile offenders would likely not become eligible for a parole or sentencing

241. See *Smith v. State*, 93 So. 3d 371, 375 (Fla. 1st DCA 2012) (Padovano, J., concurring).

242. See *Burnell v. State*, No. 01-10-00214-CR, 2012 WL 29200, at *8 (Tex. App. Jan. 5, 2012).

243. See *Graham*, 130 S. Ct. at 2022-23.

244. See *id.* at 2023.

245. See *id.* at 2030.

review hearing for a considerable number of years,²⁴⁶ the proposed approach would not affect shorter term-of-years sentences.

C. *Graham Mandates Rehabilitative Prison Services*

In addition to mandating the availability of parole or sentencing review hearings, the Court requires provision of rehabilitative prison services to juvenile nonhomicide offenders.²⁴⁷ Upon concluding that the penological theory of rehabilitation does not justify the imposition of a life without parole sentence on a juvenile nonhomicide offender, the *Graham* Court explained:

The penalty forswears altogether the rehabilitative ideal. . . . [D]efendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.²⁴⁸

The Court further stated:

[A] categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. In some prisons, moreover, the system itself becomes complicit in the lack of development. As noted above, it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration. A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.²⁴⁹

Therefore, the Court recognized that juveniles are not only "receptive" to rehabilitation, but are also the "most in need" of such services.²⁵⁰ Indeed, the opinion's language indicates that the Court prohibits life without parole sentences in part to ensure that juveniles

246. See discussion *infra* Part IV.D.1.

247. See *Graham*, 130 S. Ct. at 2030; Drinan, *supra* note 231, at 78; Green, *supra* note 236, at 12; Wallace, *supra* note 231, at 67-68.

248. *Graham*, 130 S. Ct. at 2030 (internal citations omitted).

249. *Id.* at 2032-33 (internal citation omitted).

250. *Id.* at 2030.

have the opportunity to achieve "maturity and reform,"²⁵¹ a goal that is undermined by prison policies that withhold rehabilitative services.²⁵² Moreover, if states were not required to provide rehabilitative services to incarcerated juvenile offenders, the opportunity to obtain release based on demonstrated reform would be meaningless; offenders would lack any realistic chance to achieve the requisite reform, especially in light of the prison environment, which is inherently counterproductive to the rehabilitative ideal.²⁵³ Therefore, *Graham* must entail "opportunity, while incarcerated, to develop emotionally, socially, and psychologically."²⁵⁴ This requirement poses additional burdens on states, such as Florida, that do not permit juveniles serving lengthy sentences to participate in "rehabilitative, educational, or vocational programs because there is either no release date or a release date beyond the life expectancy of the child,"²⁵⁵ as well as on states, such as California, where "prison security classifications prevent juveniles from accessing vocational and other rehabilitative services."²⁵⁶ These states must take immediate legislative action to ensure that rehabilitative prison services are available to juvenile non-homicide offenders.

D. Efforts to Comply With *Graham*

1. Florida's Failed Legislative Attempts

Compliance with *Graham* has proven especially troublesome for the sixteen states and the federal government that have entirely abolished parole and for the four states that have abolished parole for certain violent offenses.²⁵⁷ Florida is an excellent example of a state where reform is desperately needed and legislative efforts have

251. See *id.* at 2032.

252. See *id.* at 2032-33.

253. As Sally Terry Green explains, compliance with *Graham* requires states to provide "sufficient opportunity for personal development. Otherwise, the opportunity for personal growth will effectively become a non-opportunity as incarcerated juveniles learn to become seasoned criminals while subjected to the highly criminogenic adult prison culture." Green, *supra* note 236, at 12; see also Glynn & Vila, *supra* note 236, at 340 (discussing juveniles' development in prison systems in a section entitled "The State's Role in Preventing Development").

254. Green, *supra* note 236, at 18. Green also argues for an amendment to the states' sentencing statutes so as to make rehabilitation a primary goal, *id.* at 22-23, enactment of sentencing statutes that authorize trial courts to "prescribe treatment options," *id.* at 24, and the development of an alternative prison release model "that focuses on substantive rehabilitation," *id.* at 30.

255. Glynn & Vila, *supra* note 236, at 340; see also Drinan, *supra* note 231, at 78-82.

256. Glynn & Vila, *supra* note 236, at 341 (quoting Brief for Sentencing Project as Amicus Curiae in Support of Petitioners at 12, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2219303, at *12).

257. See Drinan, *supra* note 231, at 77; Glynn & Vila, *supra* note 236, at 324-25; *Reentry Trends in the U.S.: Releases from State Prison*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/content/reentry/releases.cfm> (last visited July 7, 2013).

failed.²⁵⁸ In Florida, a child may be tried and sentenced as an adult pursuant to three types of waivers: voluntary, involuntary discretionary, and involuntary mandatory.²⁵⁹ Florida has long abolished its parole system, although it continues to maintain a functioning Parole Commission to review sentences that were imposed for offenses that had been committed prior to specific dates.²⁶⁰ Aside from those rare instances, an offender's sentence may be shortened only by incentive and meritorious gaintime, and even so, the offender must serve at least eighty-five percent of his sentence.²⁶¹ Pursuant to *Graham*, Florida's sentencing scheme is unconstitutional as applied to juvenile nonhomicide offenders sentenced to life imprisonment.²⁶² In response, the Florida Legislature has been attempting to pass corrective legislation.

In 2011, the Florida House and Senate introduced bills, known as the Graham Compliance Act, which provided juvenile nonhomicide offenders sentenced to life imprisonment with the opportunity for parole.²⁶³ Specifically, under the bills an offender is eligible for an initial parole interview if he or she has served twenty-five years in prison and has had no approved disciplinary reports in the preceding three years.²⁶⁴ The Parole Commission is required to consider numerous factors in determining whether the offender "has demonstrated maturity and reform while in . . . custody" and therefore should be granted parole.²⁶⁵ An offender who is not granted

258. See Maggie Lee, *Florida Struggles with Youth Life Sentences*, JUV. JUST. INFO. EXCHANGE (July 30, 2012), <http://jjie.org/florida-struggles-youth-life-sentences/90589> ("Florida has more Graham cases than in [sic] any other state.").

259. FLA. STAT. § 985.556 (2012). Voluntary waiver occurs when the child, together with his or her parent or guardian, "demands in writing to be tried as an adult." *Id.* On the other hand, pursuant to involuntary discretionary waiver a "state attorney may file a motion requesting the court to transfer the child for criminal prosecution if the child was [fourteen] years" old or older at the time of the alleged offense. *Id.* Lastly, involuntary mandatory waiver requires that a "state attorney shall request the court to transfer and certify the child for prosecution as an adult or shall provide written reasons to the court for not making such request" if (a) the child was fourteen years or older, has been adjudicated delinquent on one of the enumerated felony offenses, and the current charge is "a second or subsequent violent crime against a person," or (b) "the child was [fourteen] years of age or older at the time of commission of a fourth or subsequent alleged felony offense and the child was previously adjudicated delinquent or had adjudication withheld for or was found to have committed, or to have attempted or conspired to commit, three offenses that are felony offenses if committed by an adult, and one or more of such felony offenses involved the use or possession of a firearm or violence against a person." *Id.*

260. *Frequently Asked Questions Regarding Parole*, FLA. DEPT OF CORRECTIONS, <http://www.dc.state.fl.us/oth/inmates/parole.html> (last visited July 7, 2013).

261. § 921.002(1)(e).

262. See *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

263. Fla. HB 29 (2011); Fla. SB 160 (2011).

264. Fla. HB 29 (2011); Fla. SB 160 (2011).

265. Fla. HB 29 (2011); Fla. SB 160 (2011). These factors are: "1. The wishes of the victim or the opinions of the victim's next of kin. 2. Whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or domination of another person. 3. Whether the juvenile offender has shown sincere and

parole at the initial interview is eligible for an interview every seven years thereafter, provided he or she does not have any approved disciplinary reports in the past three years.²⁶⁶ Both bills failed.²⁶⁷ Although the Act was endorsed by the Florida Prosecuting Attorneys Association, some legislators outright opposed the revival of parole.²⁶⁸ Child advocates also criticized the Act and argued that parole eligibility within ten or fifteen years would be more appropriate because by then juvenile offenders become "fully mature adult[s]"; moreover, they deemed the twenty-five-year criterion inappropriate because it used to be the standard for adult murderers.²⁶⁹ Similarly, the Act has been criticized on the ground that the twenty-five-year eligibility criterion "strains the 'spirit' " of *Graham* because it ignores the possibility that rehabilitation may be achieved long before the expiration of that period.²⁷⁰ This Note suggests that while juveniles may indeed be rehabilitated before the twenty-five-year period expires, it is within the states' discretion to impose such a requirement. Moreover, the juveniles in question are convicted of violent, often heinous crimes. Mandating the opportunity for juveniles to demonstrate rehabilitation from the outset in order to obtain release would place the rehabilitative penological theory above all others, in contravention to the current trend.²⁷¹

sustained remorse for the criminal offense. 4. Whether the juvenile offender's age, maturity, and psychological development at the time of the offense affected her or his behavior. 5. Whether the juvenile offender, while in the custody of the department, has aided inmates suffering from catastrophic or terminal medical, mental, or physical conditions or has prevented risk or injury to staff, citizens, or other inmates. 6. Whether the juvenile offender has successfully completed any General Educational Development, other educational, technical, work, vocational, or available self-rehabilitation program. 7. Whether the juvenile offender was a victim of sexual, physical, or emotional abuse prior to the time of the offense. 8. The results of any mental health assessment or evaluation that has been performed on the juvenile offender." Fla. HB 29 (2011); Fla. SB 160 (2011).

266. Fla. HB 29 (2011); Fla. SB 160 (2011).

267. *HB 29 – Parole for Juvenile Offenders*, FLA. HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=44803> (House Bill 29 died in the Criminal Justice Subcommittee on May 7, 2011); *SB 160 – Parole for Juvenile Offenders*, FLA. HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=44816> (Senate Bill 160 died in the Criminal Justice Subcommittee on May 9, 2011).

268. Jeff Kunerth, 'Graham Law' Would Replace Life Without Parole for Juveniles, ORLANDO SENTINEL (Apr. 12, 2011), http://articles.orlandosentinel.com/2011-04-12/features/os-life-without-parole-graham-20110412_1_terrance-graham-parole-juveniles.

269. *Id.*; see also Sheldon Gardner, *Teen Sentences Pose Challenge*, THE ST. AUGUSTINE REC. (Aug. 1, 2011, 12:31 AM), <http://staugustine.com/news/local-news/2011-07-31/teen-sentences-pose-challenge>. Florida State University Clinical Law Professor Paolo Annino asserts that the twenty-five-year waiting period is unnecessarily long because a fifteen-year-old juvenile offender "has developed psychologically" by the age of twenty-five. See *id.*

270. Green, *supra* note 236, at 39.

271. See, e.g., CAL. PENAL CODE § 1170(a)(1) (West 2013) ("The Legislature finds and declares that the purpose of imprisonment for crime is punishment."); FLA. STAT. § 921.002(1)(b) (2012) ("The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal

In 2012, the Florida House and Senate introduced bills identical to the aforementioned 2011 bills.²⁷² The House bill eventually had a committee substitute, which provided that “a juvenile offender who is sentenced to life imprisonment for a nonhomicide offense may be eligible for resentencing” if he or she has served twenty-five years and has no “approved disciplinary reports for at least [three] years before the scheduled resentencing hearing.”²⁷³ “In determining whether a juvenile offender has demonstrated maturity and reform and whether she or he should be resentenced,” the court must consider a number of factors.²⁷⁴ “If the court determines . . . that the juvenile offender can reasonably be believed to be fit to reenter society, the court must issue an order modifying the sentence imposed and placing the offender on probation for a term of at least [five] years.”²⁷⁵ A juvenile offender who is not resentenced at the initial resentencing hearing is eligible for a resentencing hearing every seven years thereafter.²⁷⁶ The Senate bill likewise had a committee substitute, which permitted a juvenile offender to petition the sentencing court to reduce or suspend the original sentence upon finding the offender “has been sufficiently rehabilitated.”²⁷⁷ To be eligible for a sentencing hearing, the juvenile offender must be “sentenced to a single or cumulative term of imprisonment of [ten] or more years for one or more nonhomicide offenses committed while she or he was [seventeen] years of age or younger”; be at least twenty-five years old; have successfully com-

of punishment.”); 204 PA. CODE § 303.11 (2012) (“[T]he Pennsylvania Commission on Sentencing . . . establishes a sentencing system with a primary focus on retribution, but one in which the recommendations allow for the fulfillment of other sentencing purposes including rehabilitation, deterrence, and incapacitation.”).

272. Fla. HB 5 (2012); Fla. SB 92 (2012).

273. Fla. CS for HB 5 (2012).

274. *Id.* These factors are: (A) Whether the juvenile offender remains at the same level of risk to society as she or he had at the time of the initial sentencing. (B) The wishes of the victim or the opinions of the victim’s next of kin. The absence of the victim or victim’s next of kin from the resentencing hearing may not be a factor (C) Whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or domination of another person. (D) Whether the juvenile offender has shown sincere and sustained remorse for the criminal offense. (E) Whether the juvenile offender’s age, maturity, and psychological development at the time of the offense affected her or his behavior. (F) Whether the juvenile offender, while in the custody of the Department, has aided inmates suffering from catastrophic or terminal medical, mental, or physical conditions or has prevented risk or injury to staff, citizens, or other inmates. (G) Whether the juvenile offender has successfully completed any general educational development or other educational, technical, work, vocational, or self-rehabilitation program. (H) Whether the juvenile offender was a victim of sexual, physical, or emotional abuse before she or he committed the offense. (I) The results of any mental health assessment, risk assessment, or evaluation of the juvenile offender. (J) The facts and circumstances of the offense for which the life sentence was imposed, including the severity of the offense. (K) Any factor that the sentencing court may have taken into account at the initial sentencing hearing” *Id.*

275. *Id.* If the offender violates the terms of probation, the court may revoke probation, and the juvenile becomes ineligible for a resentencing hearing. *Id.*

276. *Id.*

277. Fla. CS for SB 92 (2012).

pleted the GED program, unless the requirement has been waived; and have no disciplinary reports for at least three years prior to the petition.²⁷⁸ In determining whether the offender has been sufficiently rehabilitated, the court must consider a number of factors.²⁷⁹ If the court suspends or reduces the offender’s sentence, the offender must participate “in any available reentry program for [two] years upon release.”²⁸⁰ If the court does not reduce or suspend the sentence, the offender may petition the court for a sentencing hearing every seven years thereafter.²⁸¹ Both bills failed.²⁸²

Each chamber introduced an additional bill in 2012.²⁸³ The House bill, known as the Second Chance for Children Act, was identical to the committee substitute for Senate Bill 92.²⁸⁴ The Senate bill, known as the Graham Compliance Act, makes a resentencing hearing in the court of original jurisdiction available to a juvenile nonhomicide offender sentenced to life imprisonment, provided that the offender has served at least twenty-five years of the sentence and has had no approved disciplinary reports in the three years prior to the hearing.²⁸⁵ Taking into consideration numerous factors, the court is required to determine whether the offender has “demonstrated maturity and re-

278. *Id.*

279. *Id.* These factors are: “1. The juvenile offender’s age, maturity, and psychological development at the time of the offense or offenses. 2. Any physical, sexual, or emotional abuse of the juvenile offender before the commission of the offense or offenses. 3. Any showing of insufficient adult support or supervision of the juvenile offender before the offense or offenses. 4. Whether the juvenile offender was a principal or an accomplice, was a relatively minor participant, or acted under extreme duress or domination by another person. 5. The wishes of the victim or the opinions of the victim’s next of kin. 6. The results of any available psychological evaluation administered by a mental health professional as ordered by the court before the sentencing hearing. 7. Any showing of sincere and sustained remorse by the juvenile offender for the offense or offenses. 8. The juvenile offender’s behavior while in the custody of the Department including disciplinary reports. 9. Whether the juvenile offender has successfully completed or participated in educational, technical, or vocational programs and any available self-rehabilitation programs while in the custody of the department. 10. Any showing by the juvenile offender of a post-release plan including, but not limited to, contacts made with transitional organizations, faith- and character-based organizations, or other reentry service programs. 11. Any other factor relevant to the juvenile offender’s rehabilitation while in the custody of the Department.” *Id.*

280. *Id.*

281. *Id.*

282. *CS/HB 5 – Juvenile Offenders*, FLA. HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=47008> (House Bill 5 died in the Criminal Justice Subcommittee on March 9, 2012); *CS/SB 92 – Reducing or Suspending the Sentence of a Juvenile Offender*, FLA. HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=47114> (Senate Bill 92 died in the Budget Subcommittee on Criminal and Civil Justice Appropriations on March 9, 2012).

283. Fla. HB 635 (2012); Fla. CS for SB 212 (2012).

284. Fla. HB 635 (2012).

285. Fla. CS for SB 212 (2012).

form” and therefore should be resentenced.²⁸⁶ If the court determines that the offender “can reasonably be believed to be fit to reenter society,” it must modify the original sentence and place the offender on probation for at least five years.²⁸⁷ If the offender violates the “conditions of . . . probation, the court may revoke probation and impose any sentence” it could have originally imposed; the offender is not eligible for further resentencing hearings.²⁸⁸ A juvenile offender who is not resentenced at the initial hearing is eligible for a resentencing hearing every seven years thereafter.²⁸⁹ These bills likewise failed,²⁹⁰ leaving Florida without a mechanism to comply with *Graham*’s constitutional mandate.²⁹¹

286. *Id.* These factors are: “(A) Whether the juvenile offender poses the same level of risk to society as at the time of initial sentencing. (B) The wishes of the victim or the opinions of the victim’s next of kin. The absence of the victim or victim’s next of kin from the resentencing hearing may not be a factor in the court’s determination under this section. (C) Whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or domination of another person. (D) Whether the juvenile offender has shown sincere and sustained remorse for the criminal offense. (E) Whether the juvenile offender’s age, maturity, and psychological development at the time of the offense affected her or his behavior. (F) Whether the juvenile offender, while in the custody of the Department, has aided inmates suffering from catastrophic or terminal medical, mental, or physical conditions or has prevented risk or injury to staff, citizens, or other inmates. (G) Whether the juvenile offender has successfully completed any General Educational Development or other educational, technical, work, vocational, or self-rehabilitation program. (H) Whether the juvenile offender was a victim of sexual, physical, or emotional abuse before she or he committed the offense. (I) The results of any mental health assessment, risk assessment, or evaluation of the juvenile offender. (J) The facts and circumstances of the offense for which the life sentence was imposed, including the severity of the offense. (K) Any factor that the sentencing court may have taken into account at the initial sentencing hearing in relation to all other considerations listed in this section which may be relevant to the court’s determination.” *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *HB 635 – Reducing or Suspending the Sentence of a Juvenile Offender*, FLA. HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=47855> (House Bill 635 died in the Criminal Justice Subcommittee on March 9, 2012); *CS/SB 212 – Juvenile Offenders*, FLA. HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=47205> (Senate Bill 212 died on Calendar on March 9, 2012).

291. The 2013 proposals also failed. *See HB 963 – Juvenile Sentencing*, FLA. HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=50222> (House Bill 963 died in the Criminal Justice Subcommittee on May 3, 2013); *SB 998 – Juvenile Offenders*, FLA. HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=50136> & (Senate Bill 998 died in the Criminal Justice Subcommittee on May 3, 2013); Fla. HB 963 (2013); Fla. SB 998 (2013) (proposing that a juvenile offender sentenced to life imprisonment for nonhomicide offenses shall be eligible for resentencing after serving fifteen years; a juvenile offender sentenced to life for homicide offenses, sexual offenses, or attempted murder offenses be eligible for resentencing after serving twenty-five years; if the juvenile is deemed “rehabilitated and is reasonably believed to be fit to reenter society,” he or she shall be placed on probation for at least five years; and a juvenile who is denied resentencing shall be eligible for a hearing every five years thereafter); Fla. CS for HB 7137 (2013); Fla. CS for SB 1350 (2013).

Unlike Florida, a few states have successfully taken initial steps toward compliance with *Graham*. For example, California recently enacted a bill that allows a juvenile offender who has served at least fifteen years of a life without parole sentence to submit to the sentencing court a petition for recall and resentencing, provided the offender did not torture the victim and the victim was not a public safety official.²⁹² If the sentence is not recalled, the offender may submit a second petition upon having served at least twenty years; if that petition is denied, the offender may submit a third petition after serving twenty-four years.²⁹³ The offender may submit a final petition during the twenty-fifth year of his sentence.²⁹⁴ The Iowa legislature also enacted a bill that makes parole available to juvenile offenders who are not convicted of first-degree murder and who have served a minimum of twenty-five years in prison.²⁹⁵ Similarly, Louisiana now provides for parole eligibility to juvenile offenders sentenced to life imprisonment, provided they are not serving life for first-degree murder or second-degree murder, have served thirty years, and meet certain enumerated criteria.²⁹⁶

2. Suggested Response to Failed Legislative Attempts and Guidance for Future Efforts

It is up to state legislatures to create mechanisms that ensure compliance with *Graham*; policy-making authority is properly reserved to the legislative branch, which includes the power to establish the availability of parole or sentencing review hearings.²⁹⁷ However, in light of the legislature’s failure to devise a corrective mechanism, courts are forced into an untenable position.²⁹⁸ Must courts sit

292. CAL. PENAL CODE § 1170(d)(2)(A)(i)-(ii) (West 2013).

293. *Id.* § 1170(d)(2)(H).

294. *Id.*

295. IOWA CODE § 902.1 (2011).

296. LA. REV. STAT. ANN. § 574.4(D) (2012).

297. See *Gridine v. State*, 89 So. 3d 909, 911 (Fla. 1st DCA 2011) (Wolf, J., dissenting) (“The Legislature, not the judiciary, is empowered to create a provision for parole.”); *Floyd v. State*, 87 So. 3d 45, 47 (Fla. 1st DCA 2012) (“[W]e encourage the Legislature to follow the Supreme Court’s guidance in *Graham* and to ‘explore the means and mechanisms for compliance’ of its opinion.”); *Thomas v. State*, 78 So. 3d 644, 647 (Fla. 1st DCA 2011) (“This Court lacks the authority to craft a solution to this problem. We encourage the Legislature to consider modifying Florida’s current sentencing scheme to include a mechanism for review of juvenile offenders sentenced as adults as discussed in *Graham*.”).

298. See *Washington v. State*, 103 So. 3d 917, 920-22 (Fla. 1st DCA 2012) (Wolf, J., concurring) (discussing and rejecting the proposed solutions involving parole to achieve compliance with *Miller v. Alabama* and concluding that a term-of-years-without-parole sentence is the court’s only viable solution); Gardner, *supra* note 269 (discussing the variety of sentences juvenile offenders have received on *Graham* resentencing and legislative proposals in Florida to address the issue); Elaine Silvestrini, *Courts Grappling with Juveniles’ Life Sentences*, TAMPA TRIB. (Sept. 2, 2012), <http://tbo.com/news/crime/courts-grappling-with-juveniles-life-sentences-481011> (describing the uncertainties courts and attorneys are facing in Florida and the various proposed approaches).

back and wait for a legislative solution in an effort to abide by the separation of powers doctrine? Or should they develop a solution in light of the unconstitutional sentences juveniles are serving and the uncertainties attorneys and lower courts are facing?

This Note suggests that in light of the prolonged absence of corrective legislation, courts should ensure compliance with the Supreme Court's mandate. Specifically, courts should declare unconstitutional statutory provisions that prevent compliance with the *Graham* Court's interpretation of the Eighth Amendment. Judge Padovano of the First District Court of Appeal of Florida supports this approach:

Although legislative action would have been preferable, it is not absolutely necessary. If parole is the only effective solution to the constitutional deficiency identified in *Graham*, and I believe that it is, the court can cure the deficiency by addressing the constitutional validity of the statute that places a limitation on the eligibility for parole.²⁹⁹

Accordingly, Judge Padovano concluded that "the only lawful remedy is to declare unconstitutional section 947.16(6), Florida Statutes, to the extent that it applies to a juvenile offender sentenced as an adult. This would have the effect of making these offenders eligible for parole under the existing parole system."³⁰⁰ This approach does not violate the separation of powers doctrine, for it is the duty of the courts to interpret and ensure the constitutionality of laws. Ample time has elapsed since the Supreme Court handed down *Graham*, and the legislature continuously fails to resolve this significant matter even after repeated pleas by desperate courts. If the legislature disapproves of the courts' solution, it will have a greater incentive to act.

Nevertheless, this approach is an incomplete solution. After a court strikes down a statutory provision that prevents compliance with *Graham*, sentencing courts and juvenile offenders continue to remain without an alternative. To actually resolve the problem, the court would have to specify the eligibility criteria for the parole or sentencing review hearing and devise guidelines for the entire pro-

299. *Smith v. State*, 93 So. 3d 371, 376 (Fla. 1st DCA 2012) (Padovano, J., concurring); see also *id.* (explaining that under Florida's current system judges do not have sufficient authority to determine whether a juvenile offender has been rehabilitated, and, in any event, would be powerless to provide the offender with a "meaningful opportunity to obtain release" (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010))); *State v. Shaffer*, 77 So. 3d 939, 942-43 (La. 2011) (striking down statutory provisions that precluded parole eligibility in order to achieve compliance with *Graham*). But see *In re Diaz*, 170 Wash. App. 1039, at *7 n.6 (Sept. 18, 2012) (unpublished) (refusing to address a juvenile nonhomicide offender's *Graham* challenge to his 1,111-month sentence on the ground that "only the legislature has the authority to amend the [Sentencing Reform Act] to allow for such remedy, and only the executive branch can implement it").

300. *Smith*, 93 So. 3d at 375 (Padovano, J., concurring). The concurrence emphasized that Florida still has a functioning Parole Commission. *Id.* at 376-77.

cess—this is beyond the court’s power. Thus, the need for legislative action is inevitable.

Lastly, this Note offers some general guidance for future legislative efforts. While the provision of sentencing review hearings is a viable alternative to parole,³⁰¹ it remains to be seen which is the superior mechanism. Compared to parole, sentencing review hearings may be more burdensome procedurally and economically, and the outcomes more inconsistent given the lack of centralized review.³⁰² Additionally, while parole boards are already criticized for rarely approving parole,³⁰³ sentencing review hearings may further reduce the chance of release because an individual judge may be even more risk averse given that any future harm caused by a released offender would rest on his or her shoulders alone. However, the parole system is fraught with problems. For example, during parole hearings juvenile offenders do not have a constitutional right to counsel, and “parole boards routinely consider exceptionally unreliable evidence like unsubstantiated rumors.”³⁰⁴ Moreover, unlike the decisionmakers on parole boards, “all trial judges are experienced in assessing the weight of evidence, facilitating the adversarial truth-finding process, and remaining objective.”³⁰⁵ “Because political connections are often the main prerequisite for appointment to a parole board, and because the process of parole is largely invisible to the public, there is a risk that the parole board might be susceptible to political pressure.”³⁰⁶ Therefore, while further discussion is beyond the scope of this Note, it would be worth examining which mechanism is the more effective method of complying with *Graham*.

301. See discussion *supra* Part IV.A.

302. See Michelle Marquis, Note, *Graham v. Florida: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 LOY. L.A. L. REV. 255, 283-84 (2011) (stating that the “solution” of resentencing hearings “is fraught with difficulties and carries with it the significant risk that juveniles across the country will face widely disparate sentences for identical crimes”).

303. See *id.* at 286-87. “[C]ritics have questioned how meaningful the right to a parole hearing actually is, given that in many states, ‘parole hearings have become a sort of charade in which the prisoner can never actually win release, because the parole board routinely denies parole eligibility based solely upon the facts of the underlying crime, which is the one thing that the prisoner . . . can never change.’” *Id.* at 286 (quoting Jean Casella & James Ridgeway, *Supreme Court Decision Limits Juvenile Life Without Parole (Within Limits)*, SOLITARY WATCH (May 17, 2010), <http://solitarywatch.com/2010/05/17/supreme-court-limits-juvenile-life-without-parole-but-the-limits-have-their-limits/>). There is an “illusory existence of ‘meaningful’ parole release,” as demonstrated by statistics of discretionary parole releases across the nation, such as the fact that in California only one percent of parole-eligible offenders are released. *Id.* at 287.

304. Pari McGarraugh, Note, *Up Or Out: Why “Sufficiently Reliable” Statistical Risk Assessment Is Appropriate at Sentencing and Inappropriate at Parole*, 97 MINN. L. REV. 1079, 1085, 1087 (2013) (internal quotation omitted).

305. *Id.* at 1089 (footnotes omitted).

306. *Id.* at 1089-90 (internal citations and quotation omitted) (quoting a parole board member as saying, “If the governor likes you, you might get to keep your job,” and noting that the requirements for becoming parole board members are generally low).

Lastly, the better approach seems to be to tie parole or sentencing review eligibility to the number of years served, not to chronological age. While using age as an eligibility criterion is an arguably logical approach because it is correlated with maturity and reform, it has the perverse effect of ensuring that a younger and presumptively less culpable offender serves more time in prison than an older offender before having the opportunity to demonstrate reform. Moreover, the age criterion seems to place the rehabilitative ideal above all other penological goals.³⁰⁷

V. CONCLUSION

Pursuant to the *Graham* Court's mandate that states must provide juvenile nonhomicide offenders sentenced to life imprisonment with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,"³⁰⁸ states must make parole or sentencing review hearings available. Moreover, *Graham* applies to lengthy term-of-years sentences; accordingly, states should make parole or sentencing review hearings available to all juvenile nonhomicide offenders, regardless of the length of sentence, because the life expectancy approach is inadequate. In addition, *Graham* requires states to make rehabilitative prison services available to all juvenile nonhomicide offenders in order to provide them with a realistic opportunity to achieve the requisite reform. The proposed approach ensures that courts fully comply with *Graham* and do not circumvent the Court's mandate and thereby violate the Eighth Amendment. Nevertheless, states retain the necessary discretion to confine deserving juvenile offenders behind bars for life.

307. See discussion *supra* Part IV.D.

308. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).